Form No. 7

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO

No. 6341

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Appellant,

vs.

CALIFORNIA SEA PRODUCTS COMPANY, a Corporation,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Proctors for Libelant (Appellee):
HAROLD M. SAWYER, Esq., and
ALFRED T. CLUFF, Esq.,
Balfour Bldg., San Francisco, Cal.

Proctors for Respondent (Appellant):
ROBERT BRENNAN, Esq., and
H. K. LOCKWOOD, Esq.,
Kerckhoff Bldg., Los Angeles, Cal.

In the Southern Division of the United States District Court for the Northern District of California, Third Division.

IN ADMIRALTY—No. 19,403.

CALIFORNIA SEA PRODUCTS COMPANY, a Corporation,

Libellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,

Respondent.

LIBEL IN PERSONAM FOR COLLISION.

To the Honorable, the Judges of the District Court of the United States, for the Northern District of California:

The libel of California Sea Products Company, a corporation, owner of the American steamer

"Lansing," against The Atchison, Topeka & Santa Fe Railway Company, a corporation, in a cause of collision, civil and maritime, respectfully alleges as follows:

I.

That at all times herein mentioned the libellant was and still is a corporation duly created, organized and existing under and by virtue of the laws of the State of California, with its principal office for the transaction of its business within the Northern District of California, and that it was and still is the owner of the American steamer "Lansing" and operated said steamer as a whaling vessel in the waters of the Pacific Ocean.

II.

That at all times herein mentioned the respondent, The Atchison, Topeka & Santa Fe Railway Company, was and still is a corporation duly created, organized and existing under and by virtue of the laws of the State of Kansas and that it was and still is doing business within the Northern District of California, and was and still is the owner and operator of the American tug "A. H. Payson."

III.

That on the 16th day of November, 1926, at or about the [1*] hour of 1:00 A. M., a collision occurred between the libellant's steamer "Lansing" and the respondent's tug "A. H. Payson" while the said steamer "Lansing" was properly and lawfully moored at *it* berth on the south side of Pier

*Page-number appearing at the foot of page of original certified Apostles on Appeal.

46 on the waterfront of San Francisco in the Northern District of California; that as a result of said collision the said steamer "Lansing" was badly crushed, broken and otherwise damaged and it, together with other vessels of the whaling fleet owned by the libelant was delayed in beginning a whaling voyage upon which the said steamer and the other vessels in the whaling fleet were then about to commence.

IV.

That as the libelant is informed and believes and therefore alleges, the following are the circumstances of the said collision:

On the day above mentioned, at or about the hour of 1:00 A. M., the said steamer "Lansing" was properly and securely moored at its lawful and accustomed berth on the south side of Pier 46 on the San Francisco waterfront. Under these circumstances the respondent's tug "A. H. Payson," having in tow a barge belonging to the respondent, known as "Barge No. 1," began to maneuver in the slip adjacent to the said pier and in the vicinity of the said steamer "Lansing." Instead of going ahead on her engines so as to keep clear of the "Lansing," the said tug "A H. Payson" suddenly and without warning put her engines full speed astern and backed into the said steamer "Lansing," striking her with her stern on the port side amidships, seriously damaging three shell plates on the port side in the way of the after end of the fireroom, bending and damaging five single frames and two web frames, badly buckling the gusset connecting,

stringer and strong beam and otherwise badly damaging and injuring the said steamer.

V.

That at all times herein mentioned, said steamer "Lansing" was properly and securely moored in its customary and lawful [2] mooring place; that the collision was in no way due to any fault on the part of the said steamer "Lansing" or its officers or crew or of the libellant, its agents, servants or employees, but that, on the contrary, the said collision was due solely to the fault of the respondent's tug "A. H. Payson" and to the negligence of her master, officers and crew, in the following respects:

1. In that said tug "A. H. Payson" was negligently and recklessly navigated without the care and caution required by law and good seamanship, and in gross violence of the provisions of Article 27 and Article 29 of the Inland Rules for the prevention of collisions.

2. In that the said tug failed to have on watch efficient and competent officers and members of her crew.

3. In that the said tug failed to maintain a competent and efficient lookout.

4. In that said tug negligently and carelessly came astern on her engines when she should have gone ahead.

5. In that said tug was at fault and her master, officers and crew were negligent in other and further particulars concerning which the libellant is not at present advised, but respecting which it begs

leave to offer proof as and when advised and to amend its libel accordingly.

VI.

That as a result of the said collision the said steamer "Lansing" was so badly damaged that it was necessary to effect repairs upon her in the sum of Thirty-five Hundred Fifty-four and 09/100 Dollars ($3554.09), and that the respondent has heretofore admitted responsibility for the physical damage to the said steamer and has paid to the libellant the sum of Thirty-five Hundred Fifty-four and 09/100 ($3554.09) Dollars; that the libellant has suffered additional damages through loss of use of the said vessel and through demurrage for the reason that the said steamer "Lansing" was the "mother ship" of the libellant's whaling fleet and [3] that while and during the time the said steamer "Lansing" was laid up for repairs, it was impossible to operate either the said steamer "Lansing" or the other vessels of the said whaling fleet; that at the time said collision occurred the said steamer "Lansing," together with the other members of the whaling fleet, were preparing to depart on a voyage to the whaling grounds; that by reason of the said collision this departure was delayed for six days; that by reason of such delay the libellant has been damaged in the sum of Sixty-one Hundred Sixteen and 48/100 ($6116.48) Dollars; that the libellant has demanded payment of the said sum of Sixty-one Hundred Sixteen and 48/100 ($6116.38) Dollars from the respondent herein, but that the respondent has refused and still refuses

to pay the said sum of Sixty-one Hundred Sixteen and 48/100 ($6116.48) Dollars to the libellant, and that the libellant now prays reparation for said sum with interest thereon according to the uses and practices of this Honorable Court.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, the libellant prays that process in due form of law according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said The Atchison, Topeka & Santa Fe Railway Company, a corporation, and that it may be cited to appear and answer upon oath all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree payment to libellant of its damages in the sum of Sixty-one Hundred Sixteen and 48/100 ($6116.48) Dollars, as aforesaid, with interest and costs, and that libellant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

SAWYER & CLUFF,
Proctors for Libellant. [4]

State of California,
City and County of San Francisco,—ss.

E. J. Pringle, being first duly sworn, deposes and says:

That he is an officer, to wit, the Vice-president of California Sea Products Company, a corporation,

the libellant named in the foregoing libel; that he makes this verification on behalf of said corporation; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein alleged upon information and belief, and as to those *matter* he believes it to be true.

E. J. PRINGLE (Signed).

Subscribed and sworn to before me this 25th day of August, 1927.

[Seal] RAY SOPHIE FEDER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 29, 1927. [5]

[Title of Court and Cause.]

STIPULATION FOR ENTRY OF INTERLOCUTORY DECREE.

IT IS HEREBY STIPULATED by and between the respective parties hereto that the collision referred to in the libel on file herein was due to the sole fault of the tug "A. H. Payson," owned by the respondent above named.

IT IS FURTHER STIPULATED that an interlocutory decree may be entered in the above-entitled cause in which it may be ordered, adjudged and decreed that the libellant may have and recover from the respondent, whatever damages, if any, the libellant sustained by reason of the matters al-

leged in said libel, and in which the said cause may be referred to a master to ascertain and compute the amount of the said damages, if any.

Dated at San Francisco this 17th day of October, 1927.

SAWYER & CLUFF,
Proctors for Libellant.
E. W. CAMP,
PLATT KENT,
Proctors for Respondent.

[Endorsed]: Filed Oct. 18, 1927. [6]

In the Southern Division of the United States District Court, for the Northern District of California, Third Division.

IN ADMIRALTY—No. 19,403.

CALIFORNIA SEA PRODUCTS COMPANY, a Corporation,

Libellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,

Respondent.

INTERLOCUTORY DECREE.

A stipulation in writing having been filed herein, wherein and whereby it has been stipulated and agreed, by and between the respective parties hereto, that the collision referred to in the libel

on file herein was due to the sole fault of the tug "A. H. Payson," owned by the respondent above named, and wherein and whereby it has been further stipulated and agreed, by and between the respective parties hereto, that an interlocutory decree may be entered in this cause in favor of the libellant and against the respondent in the manner and form in said stipulation referred to,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the libellant, California Sea Products Company, a corporation, may have and recover from the respondent, The Atchison, Topeka & Santa Fe Railway Company, a corporation, whatever damages, if any, it sustained by reason of the matters alleged in the libel, together with interest and costs.

AND IT IS FURTHER ORDERED that said cause be referred to Francis Krull, Esquire, United States Commissioner, to ascertain and compute the amount due to libellant in the premises, and to report the same to this Court with all convenient speed.

Dated at San Francisco this 18th day of Oct., 1927.

FRANK H. KERRIGAN,
United States District Judge.

Approved as to form.

E. W. CAMP,
PLATT KENT,
Proctors for Respondent. [7]

[Endorsed]: Entered in Vol. 22 Judg. and Decrees, at Page 100.

Filed Oct. 18, 1927. [8]

[Title of Court and Cause.]

REPORT OF U. S. COMMISSIONER.

To the Honorable, the Southern Division of the United States District Court for the Northern District of California, Third Division, In Admiralty:

PURSUANT to an order made by the Court in the above-entitled case referring the same to the undersigned to ascertain and report the amount of damages due the libelant, I have to report that I was attended by the proctors for the respective parties referred to and hereby made a part hereof, was taken as therein set forth and the proceedings were had as therein stated.

Libelant claims compensation as demurrage for six days' delay of a whaling voyage on which its vessel the "Lancing" was preparing to depart at the time of the collision herein, and that it is entitled to recover the net profits upon the number of whales which it would have caught had its vessel arrived at the whaling grounds six days earlier that the day it actually arrived.

Six days were consumed in making the necessary repairs consisting of the removal of three dented plates to be straightened and returned on the port side of the vessel about amidships which left an

opening variously testified to by libelant's witnesses as being from 12 to 20 inches above the water-line. Pending these repairs it is contended by libelant that the final work on the vessel of testing tanks which was being done by filling them with water had to be suspended because of the danger of the vessel being lowered in the water to such an extent during the testing operations that there was great danger of water entering thru the opening and sinking the vessel. [9]

Respondent admitted liability for the collision and paid for the repair of the physical damage to the vessel, but contends that libelant's claim for demurrage is based on earnings that are speculative and remote and exist only in anticipation and that the prospective venture from which the earnings were to be had was not an established business from which the earnings could be ascertained with reasonable certainty; that the tanks that libelant was engaged in testing could have been tested simultaneously with the repair work by proper care or other methods without endangering the safety of the vessel and thus no time would have been lost on account of the collision damage repairs.

There is a conflict in the evidence as to the necessity of a complete suspension of the work of testing the tanks while the collision repairs were being made, but when all of the facts and circumstances surrounding the situation are considered, I cannot say that libelant was not justified in suspending this work during the making of the collision repairs.

It appears that libelant had been engaged in

whaling along the coast of California with reducing stations at Trinidad and at a point near Monterey, California, to which whales captured along the coast were taken to be reduced to salable products and it was now converting the "Lancing," an old oil tanker, into a floating whale factory and supply ship to serve as the mother ship to the smaller boats that were to do the hunting of whales in the waters adjacent to San Clemente Island off the southern coast of California and other places along the coast where whales are to be found. It took libelant from November 22d, 1926, the date the collision repairs were completed, until December 16th, 1926, to complete the testing of the tanks and fully equip the "Lancing," during which time three days were also used in waiting for an unsuccessful attempt by one of the killer [10] boats to capture and bring in a whale to test the machinery on the "Lancing." All of the time it appears was fully occupied with the necessary preparations which were hurried as much as possible under all the surrounding circumstances and conditions as they prevailed. After a careful consideration of all the evidence I am of opinion that libelant's vessel was delayed by the collision repairs in its final preparations to set forth in quest of whales. It also appears that the months of November, December and January are most favorable for the capture of whales.

I am satisfied that libelant was experienced in the capture of whales and that its floating factory while untried was a progressive step in reducing captured whales into marketable products and that it proved successful in its operations.

I am further satisfied from the evidence that it is reasonable to suppose that libelant would have captured and reduced whales to salable products during the six days immediately preceding December 19, 1926, the date it actually arrived at the whaling grounds, had the "Lancing" with her killer boats been in the waters adjacent to San Clemente Island during this period; and that there was a ready market for the products.

From the nearest weather reports for the period and subsequent experience, it is reasonable to suppose that the weather conditions would have been much the same during the six days immediately before the six days during which time libelant captured six whales. While the average catch of whales for the remainder of the month of December, 1926, and for the season from December 19, 1926, to February, 1927, was greater, I am constrained to find that libelant's catch for the six days of whaling lost would have been the same as was the catch for the first six days after it arrived prepared to whale, and I am of opinion that an allowance of six whales for the six days of whaling lost will fully compensate libelant for its loss when all contingencies are [11] balanced and measured by the rule:

> "That demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been lost, and the amount of such profits is proven with reasonable certainty." The Conquerer, 166 U. S. 125, 17 Sup. Ct. Rep. 516, 41 L. Ed. 937.

From the statement submitted by libelant of an analysis of its records showing the estimated profits on each whale captured over a considerable period, I do find the revenue from six days' whaling at an average catch of one whale per day to be as follows:

Six whales @ $594.86		$3569.16
LESS:		
Extra fishing and killing charges, etc., in catching six whales		
Gunners' supplies @ $13.50 per whale	$ 81.00	
Bonus to crew of killer boats @ $58.50 per whale	351.00	
Bonus to crew of S.S. "Lancing" @ $85.20 per whale	511.20	
Fuel oil consumed six days' whaling	436.08	
Coal consumed same	375.00	
Lubricating oil, etc.	35.00	
TOTAL	$1789.28	
Less wharfage and port lights, 6 days at $15.10 per day, while vessel was undergoing collision repairs while at dock	90.60	
	1698.68	1698.68
TOTAL		$1870.48

From the foregoing I do therefore find and report that there is due libelant from respondent for loss of profits for six days' whaling while making repairs of collision damage caused by respondent's fault, the sum of $1870.48, together with interest at the rate of 7% per annum from December 19th, 1926, the date libelant actually began the delayed operation of its profitable venture.

Dared, May 23, 1930.

FRANCIS KRULL.
FRANCIS KRULL,
Special Master.

The foregoing report was submitted to the respective parties with the suggestion that any exception which might be made thereto be submitted before the filing of said report and that the same would be duly considered. Libelant announced that it was satisfied with the report as submitted. Respondent filed exceptions contending that the evidence [12] does not support the conclusions announced.

After a careful consideration of the exceptions filed by respondent and libelant's answer thereto, I am constrained to file the report without modification, because I am of opinion that the evidence shows and the reasonable inferences therefrom are:

1. That the six days consumed in making the necessary collision repairs were lost to libelant and that it is reasonable to infer therefrom that libelant would have been whaling six days sooner than it actually did had it not been so delayed.

2. That the intervening time between the suspension of testing the tanks, which was at the direction of an experienced and competent marine surveyor, and the time that libelant actually began whaling was used with reasonable expedition, to put the "Lancing" in proper shape to serve the purpose for which she was intended.

3. That libelant had been engaged in whaling for nine years, and was experienced in the whaling business along the coast of California; that it was adopting a new method in its business which would enable it to reduce whales caught to marketable products while at sea and in close proximity to its whaling boats. This method made the "Lancing" the heart of its business upon which the entire enterprise depended.

4. That libelant had a definite place where it was going to begin its whaling operations and where it contemplated that it would find whales at that season of the year in such numbers as to make the voyage a profitable one; that during the remainder of the month of December, 1926, when libelant started whaling, and the next year during the same month, whales were captured in a greater average number per day in these waters where libelant intended to and did begin its whaling operations, than is allowed herein for the six days lost in whaling. [13]

5. That it is reasonable to suppose that the six days lost would have resulted in six days of profitable whaling and the profits therefrom are as reasonable of ascertainment as the loss of earnings in

fishing cases in which courts of admiralty have allowed for what would be a reasonable catch of fish during an interrupted fishing season or voyage, under the well-established rule of *restitutio in integrum*. The Gleaner, 3 Asp. M. C. 582, 38 L. T. 650; The Resoluto, 5 Asp. M. C. 93, 48 L. T. 909; The Mary Steele, 17 Fed. Cas. No. 9226; The Menomminee, 125 Fed. 530.

In the cases cited by respondent in support of its contention that libelant's was not an established business from which profits could be estimated with reasonable certainty, the expected profits could not be shown with reasonable certainty because there was nothing tangible either before or after the interruption of the enterprise from which an estimate of profits could be made. In the instant case the enterprise immediately resulted in profit on an average basis for each day's whaling when commenced up to a period when whales became scarce and during the following year in the same waters the same profitable whaling was had over the same period of months and from this it is reasonable to infer that whaling is seasonable in these waters and that the six days lost were in the period of the season's best whaling.

Accompanying this report are:

1. Libelant's opening brief.
2. Respondent's reply brief.
3. Libelant's closing brief.
4. Respondent's exceptions to report.
5. Libelant's reply to respondent's exceptions.

All of which is respectfully submitted.

July 14, 1930.

FRANCIS KRULL.
FRANCIS KRULL,
Special Master.

[Endorsed]: Filed Jul. 15, 1930. [14]

[Title of Court and Cause.]

RESPONDENT'S EXCEPTIONS TO PROPOSED REPORT OF HONORABLE FRANCIS KRULL, SPECIAL MASTER.

To the Honorable United States District Court for the Northern District of California, Southern Division, Third Division, in Admiralty:

The respondent, The Atchison, Topeka and Santa Fe Railway Company, a corporation, respectfully excepts to the proposed report of Honorable Francis Krull, Special Master, filed herein, in the following particulars:

EXCEPTION No. I.

Respondent excepts to the following finding as set forth on page three of said report:

> "All of the time (November 22d to December 16, 1926) it appears was fully occupied with the necessary preparations which were hurried as much as possible under all the surrounding circumstances and conditions as they prevailed. After a careful consideration of all the evidence I am of opinion that libelant's

> vessel was delayed by the collision repairs in its final preparations to set forth in quest of whales." [15]

for the following reasons:

(a) There was competent testimony that water could have been placed in the tanks on the starboard side of the "Lansing" with entire safety while the repairs were being made. (Tr., page 195.)

(b) There was competent testimony that the proper way to test the tanks was to force through a graphite combination and find the leaks before any water was put in the tanks. (Tr., pages 169, 194.)

(c) Considerable time was lost after the "Lansing" got out into the stream on account of coal being supplied in rotten sacks which all had to be resacked, requiring considerable additional time. (Tr., pages 17, 18, 27, 50.)

(d) There was competent testimony that supplies could be taken on the "Lansing" while she was still at the pier. (Tr., pages 198 and 299.)

(e) Much time was spent by the crew in chipping rust which did not further the repairs of the vessel. (Tr., pages 33 to 38.)

EXCEPTION No. II.

Respondent excepts to the following finding as set forth on page three of said report:

> "It also appears that the months of November, December and January are most favorable for the capture of whales."

for the following reasons:

(a) F. K. Dedrick, President and General Manager of libelant, testified:

> "Down here off San Clemente and Southern California, you can operate there the whole winter if you want to, if you find any whales down there." (Tr., page 25.) [16]

EXCEPTION No. III.

Respondent excepts to the following finding as set forth on page four of said report:

> "I am constrained to find that the Libelant's catch for the six days of whaling lost would have been the same as was the catch for the first six days after it arrived prepared to whale."

for the following reasons:

(a) There is no testimony that whales were ever captured in that locality before, and only the evidence of libelant itself that whales were caught at times subsequent to said period.

(b) That the evidence fails to prove with reasonable certainty that said whales would have been caught.

EXCEPTION No. IV.

Respondent excepts to the following finding as set forth on page five of said report:

> "From the foregoing I do therefore find and report that there is due Libelant from respondent for loss of profits for six days whaling while making repairs of collision damage caused by respondent's fault, the sum of

$1870.48, together with interest at the rate of 7% per annum from December 19, 1926, the date libelant actually began the delayed operation of its profitable venture."

for the following reasons:

(a) That said finding is unsupported by any legal evidence.

(b) That said finding is contrary to all the evidence.

(c) The Honorable Special Master admitted on page four of his report that the floating factory was "untried," hence the fate of this new venture was merely conjectural and too uncertain and remote to be made the basis of a verdict for damages.

(d) Conceding (for the sake of the argument only but not otherwise) that there was a delay of six days [17] in arriving at the San Clemente waters, libelant could have recouped the loss, if there was any loss, by remaining in San Clemente waters for a longer period of time, there being no competent evidence that the whaling season in the San Clemente waters ended at any particular time and no showing that libelant was compelled to abandon said waters on account of failing results or for any other reasons.

EXCEPTION No. V.

That the finding of the Honorable Special Master, as set forth in Point IV above, is contrary to law for each and all of the reasons named and set forth under said point.

Dated, Los Angeles, California, May 29, 1930.

Respectfully submitted,

ROBERT BRENNAN,

H. K. LOCKWOOD,

Proctors in Admiralty for the Respondent, The Atchison, Topeka and Santa Fe Railway Company, a Corporation.

[Endorsed]: Filed June 15, 1930. [18]

[Title of Court and Cause.]

LIBELANT'S ANSWER TO EXCEPTIONS OF RESPONDENT.

The libelant, California Sea Products Company, a corporation, respectfully answers to the exceptions to the proposed report of the Honorable Francis Krull, Special Master, filed herein, as follows:

EXCEPTION No. 1.

(a) The claim that the starboard summer tanks could have been filled has been fully answered in libelant's closing brief, pages 30–31. Such a claim is unsupportable in view of the fact that the No. 2 and No. 3 holds had to be filled, too. (Tr. 246.) The "Lansing" had heavy equipment on her decks (Tr. 7), and her transverse stability was unknown. (Tr. 228–229.) The libelant was not bound to experiment.

(b) The tests of the "Lansing's" tanks were interrupted by the collision. (Tr. 21, 58, 59, 60.) The libelant was not bound to abandon its method of testing merely because there had been a collision.

The method of testing suggested by respondent was impossible. (Tr. 257.)

(c) Loss of time occasioned by the rottenness of coal sacks is not attributable to any act of the libelant.

(d) The evidence offered at page 198 of the transcript was not competent, as was fully brought out at page 202 of the transcript, where it appeared that the repair raft was already moored alongside the "Lansing." There would not have been room for vessels to pass the "Lansing" and fueling barges at Pier 46. (Tr. 13.) The fuel oil and water had to go into the tanks which were being tested. (Tr. 17.) The coal was ordered to be delivered in the stream, and the order was placed [19] before the collision took place. (Libelant's Exhibit No. 5.) There is nothing in the record to the effect that it is not customary or proper to take on coal or other supplies in the stream, and there is nothing therein to substantiate a claim that the orders for fuel and coal should have been changed.

There is no page 299 of the transcript.

(e) Chipping rust is a matter of ship routine. It goes on in any event. On the same days the *d*rew was chipping rust it was also taking on coal and fuel oil (Tr. 50–51; 93–94), or else it was too rough to work coal. (Tr. 74; 90.) Part of the time, the "Lansing" was at California City waiting for a tug to bring in a whale. (Tr. 35.)

EXCEPTION No. 2.

(a) Captain Dedrick's testimony that "you can operate there the whole winter if you want to, if you

find any whales down there" is not evidence that whales are equally abundant the whole year round. The actual records kept by the "Lansing" during the 1926–1927 and 1927–1928 seasons show that the months of November, December and January are the best whaling months. (Tr. 131–134.) See Libelant's Closing Brief, page 18.

EXCEPTION No. 3.

(a) It is unnecessary to prove that whales were ever captured off San Clemente before. This is a question of law, decided by The Conqueror, and not a question of fact.

(b) Evidence that six whales were captured the first six days after arrival is sufficient.

EXCEPTION No. 4.

(a) This specification is too general for us to answer from the record.

(b) This specification is too general for us to answer from the record.

(c) The evidence introduced in support of libelant's claim was clear and definite and therefore sufficient to sustain the award. The rule of remoteness will not apply when [20] there is evidence of profits, expenses and sales. See Libelant's Closing Brief, pages 4–14.

(d) The argument about recoupment is fallacious for the reason already pointed out, that the libelant was entitled to all the whales it caught after arrival and was not bound to stay on the whaling grounds until it had captured the same number it would have captured had the "Lansing" arrived

six days earlier. This phase of the case is completely covered in Libelant's Closing Brief, pages 17–19.

EXCEPTION No. 5.

This exception is the same as No. 4 and is not well taken for the same reasons noted above.

Dated: San Francisco, California, June 4th, 1930.

SAWYER & CLUFF (Signed)
Proctors for Libelant.

[Endorsed]: Filed Jul. 15, 1930. [21]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 24th day of July, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable FRANK H. NORCROSS, Judge.

[Title of Court and Cause.]

MINUTES OF COURT—JULY 24, 1930—ORDER CONFIRMING REPORT OF SPECIAL MASTER.

On motion of Mr. Street, proctor on behalf of libelant, and no objection being made thereto, IT IS ORDERED that the report of the special master herein as to an award heretofore filed herein be and the same is hereby confirmed and that compen-

sation be allowed said Commissioner, as prayed, and that decree be entered herein accordingly. [22]

[Title of Court and Cause.]

NOTICE OF MOTION TO SET ASIDE CONFIRMATION OF COMMISSIONER'S REPORT AND FOR HEARING ON RESPONDENT'S EXCEPTIONS.

To the Above-named Libelant, and to Messrs. Sawyer & Cluff, Its Proctors:

YOU AND EACH OF YOU will please take notice that the respondent, by its proctors, will move the above-entitled court in the Department of Honorable A. F. St. Sure, in the courtroom of the Federal Building, City and County of San Francisco, California, on the 18th day of August, 1930, at the hour of 10:00 o'clock A. M. of said date, or as soon thereafter as counsel can be heard, to set aside the confirmation of the Commissioner's report made and entered on the 24th day of July, 1930, and to grant to respondent a hearing on its exceptions to said Commissioner's report, and if said exceptions filed herein, on July 15, 1930, are insufficient to fix a time within which the respondent may file exceptions herein and for a hearing thereon.

Said motion will be made upon the ground that at the time of the confirmation of said Commissioner's report there was then on file with the Clerk of this court respondent's exceptions to said Commissioner's report, which fact was known by proctors

for the libelant and that said respondent was granted no hearing upon said exceptions, and on the affidavit of H. K. Lockwood, in support hereof.

Dated, this 1st day of August, 1930.

ROBERT BRENNAN,
H. K. LOCKWOOD,
Proctors for Respondent.

[Endorsed]: Filed Aug. 4, 1930. [23]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 18th day of August, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable A. F. ST. SURE, Judge.

[Title of Court and Cause.]

MINUTES OF COURT—AUGUST 18, 1930—ORDER GRANTING MOTION TO SET ASIDE CONFIRMATION.

The motion to set aside order confirming Commissioner's report came on to be heard, and after argument, IT IS ORDERED that said motion be granted. ORDERED that the exceptions to the Commissioner's report be placed on the calendar for Monday, August 25, 1930, for hearing. [24]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 15th day of September, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable A. F. ST. SURE, Judge.

[Title of Court and Cause.]

MINUTES OF COURT—SEPTEMBER 15, 1930 —ORDER OVERRULING EXCEPTIONS AND CONFIRMING COMMISSIONER'S REPORT.

The exceptions to Commissioner's report came on to be heard, and after argument, IT IS ORDERED that said exceptions be submitted, and the same being fully considered, IT IS ORDERED that said exceptions be overruled and that the Commissioner's report be and the same is hereby confirmed. [25]

[Title of Court and Cause.]

PROPOSED AMENDMENTS AND ADDITIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

To California Sea Products Company, a Corporation, and to Messrs. Sawyer & Cluff, Its Proctors:

Comes now the defendant, The Atchison, Topeka

& Santa Fe Railway Company, a corporation, through its proctors, and conforming to Admiralty Rule No. 62 and General Rule No. 42 of the United States District Court for the Northern District of California and proposes the following amendments and additions to the findings of fact and conclusions of law proposed by the libelant and lodged with the Clerk herein:

1. That finding No. VIII be amended to read as follows:

> "That libelant has been engaged in the whaling industry for a period of nine years but not in the San Clemente waters."

2. That finding No. X be amended to read as follows:

> "That libelant captured thirty-five whales in the waters of San Clemente Island in the month of December, 1926."

3. That finding No. XIII be amended to read as follows:

> "That the capture of whales in the waters of San Clemente Island is not a seasonal occupation."

4. To amend finding No. XIV thereof by striking out said finding *in toto* as not supported by the evidence.

5. To amend finding No. XVI by striking out said finding *in toto* as not supported by the evidence.

6. To amend the conclusions of law by striking

out paragraph I thereof *in toto* as not supported by the evidence.

ROBERT BRENNAN,
H. K. LOCKWOOD,
Proctors for Respondent. [26]

[Endorsed]: Receipt of copy of the within admitted this 23d day of September, 1930, subject to rules of court.

SAWYER & CLUFF,
Proctors for Libelant.

Filed Sep. 24, 1930. [27]

[Title of Court and Cause.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 17th day of November, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable A. F. ST. SURE, Judge.

MINUTES OF COURT—NOVEMBER 17, 1930—ORDER DENYING MOTION TO AMEND FINDINGS.

The motion to amend findings, etc., came on to be heard and after argument IT IS ORDERED that said motion be denied, and respondent allowed an exception to the ruling of the Court. [28]

[Title of Court and Cause.]

FINDINGS OF FACT.

The above-entitled cause came on regularly for hearing before the Honorable Francis Krull, United States Commissioner, on the 23d day of February 1928, on the 11th day of December, 1928, on the 21st day of May, 1929, on the 4th day of June, 1929, and on the 26th day of June, 1929, each hearing having been convened, adjourned and reconvened by the consent of all parties, Harold M. Sawyer, Esq., appearing for the libelant and Platt Kent, Esq., appearing for the respondent; and evidence both oral and documentary having been introduced, the report of the Commissioner having been filed on the 15th day of July, 1930, and the said report having been confirmed by the court on the 15th day of September, 1930, the court now makes its findings of fact as follows:

I.

That all the allegations contained in Paragraphs I, II, III, IV, V and VII of the libel are true.

II.

That the respondent has paid to libelant the sum of $3,554.09 as costs of repairing the physical damage to the steamer "Lansing," as alleged in Paragraph VI of the libel.

III.

That at the time of the collision the libelant was engaged in testing the tanks of the steamer "Lansing."

IV.

That six days were consumed in making repairs of the collision damage. [29]

V.

That it was necessary to suspend the testing of the steamer "Lansing's" tanks during the period the collision damage was being repaired.

VI.

That tests of the said tanks were finally completed on the 8th day of December, 1926, and that libelant was diligent in completing the tests after the collision repairs were made.

VII.

That libelant used all reasonable haste in preparing the steamer "Lansing" for the intended voyage after the tests of the tanks were completed.

VIII.

That libelant has been engaged in the whaling industry for a period of nine years.

IX.

That the steamer "Lansing" was the "mother ship" of libelant's whaling fleet.

X.

That libelant captured thirty-five (35) whales in the waters of San Clemente Island in the month of December, 1926, and sixty-seven whales in the month of December, 1927.

XI.

That as a result of the collision, libelant was de-

layed six days in arriving on the whaling grounds in the waters of San Clemente Island.

XII.

That weather and sea conditions in the waters of San Clemente Island from the 13th day of December, 1926, until the 19th day of December, 1926, were favorable to the capture of whales.

XIII.

That the capture of whales in the waters of San Clemente Island is a seasonable occupation. [30]

XIV.

That during the period from December 13th, 1926, until December 19th, 1926, libelant could, with reasonable certainty, have captured six whales in the waters of San Clemente Island.

XV.

That the market value of six whales is $3,569.16, and that the total cost and expense of capturing six whales is $1,698.68.

XVI.

That all the conclusions of fact made by the Commissioner and included in his report are true.

CONCLUSIONS OF LAW.

And as conclusions of law from the foregoing facts, the court finds:

I.

That libelant is entitled to recover from respondent as demurrage, the sum of $1,870.48, together with interest at the rate of seven per cent (7%)

per annum, from December 19th, 1926, and its costs of suit herein.

A. F. ST. SURE,
District Judge.

Nov. 17, 1930.

[Endorsed]: Filed Nov. 17, 1930. [31]

In the Southern Division of the United States District Court, for the Northern District of California.

IN ADMIRALTY—No. 19,403.

CALIFORNIA SEA PRODUCTS COMPANY, a Corporation,

Libelant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Respondent.

FINAL DECREE.

An interlocutory decree having been heretofore entered in the above-entitled suit, wherein and whereby it was ordered, adjudged and decreed that the libelant have and recover from the respondent, The Atchison, Topeka and Santa Fe Railway Company, the amount of its damages arising out of the matters set forth in the libel herein, and referring the said cause to Francis Krull, Esq., United States Commissioner, to ascertain and compute the amount due to libelant in the premises, and the said Com-

missioner having subsequently, and on the 15th day of July, 1930, filed his report, fixing the libelant's said damages in the sum of $1,870.48, together with interest at the rate of 7% per annum from December 19, 1926;

And notice of the filing of the said report having been duly served upon the proctors for the respondent on the 17th day of July, 1930, and the said report, by the *ex parte* order of the above-entitled court, having been duly made and entered on the 22d day of July, 1930, confirming [32] the said report and allowing the fees of the said Commissioner in the sum of $250.00;

And the above-entitled court, upon motion of respondent duly noticed and heard, having, on the 18th day of August, 1930, entered its order vacating and setting aside the said prior order confirming the said Commissioner's report, and ordering further that the exceptions to the said report theretofore filed with the papers in the within cause by the said Commissioner Francis Krull, Esq., on the 15th day of July, 1930, be heard and determined;

And the exceptions to the report of the said Commissioner having come on regularly for hearing on the 15th day of September, 1930, and the same having been heard, and the Court, after due deliberation and consideration of the foregoing matters and of the said report, having duly made and entered its order, on the 15th day of September, 1930, overruling the exceptions to the said report and confirming the same;

And the findings of fact having been approved and signed and filed with the papers in the cause,—

NOW, THEREFORE, on motion of Messrs. Sawyer & Cluff, proctors for libelant,—

IT IS ORDERED, ADJUDGED AND DECREED that the libelant, California Sea Products Company, have and recover from the respondent, The Atchison, Topeka and Santa Fe Railway Company, the said sum of $1,870.48, with interest thereon at the rate of 7% per annum from the said 19th day of December, 1926, to the date hereof, amounting to the sum [33] of $512.10, said judgment amounting in the aggregate to the sum of $2382.58, together with the sum of $451.00, costs of the libelant as taxed herein, with interest on the said aggregate sum at the rate of 7% per annum from the date hereof until paid.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that unless the decree be satisfied or an appeal taken therefrom within ten days after service of a copy of the decree upon the proctors for the respondent, Atchison, Topeka and Santa Fe Railway Company, the libelant may have such other and further orders of this Court as may be just and proper in the premises.

Dated: This 17 day of November, 1930.

A. F. ST. SURE,
District Judge.

Entered in Vol. 26 Judg. and Decrees, at page 131.

[Endorsed]: Filed Nov. 17, 1930. [34]

[Title of Court and Cause.]

TESTIMONY TAKEN ON REFERENCE.

San Francisco, California, Thursday, Feb. 23, 1928, 2:00 o'clock P. M.

HEARING ON REFERENCE.

Before: Hon. FRANCIS KRULL, Commissioner.

APPEARANCES:

For the Libelant: H. M. SAWYER, Esq., of Messrs. SAWYER & CLUFF.

For the Respondent: PLATT KENT, Esq.

Mr. SAWYER.—Your Honor, I think it will simplify the proceeding if I make a brief statement concerning the issues. This is the case of the California Sea Products Company, a corporation, libelant, against the Atchison, Topeka & Santa Fe Railway Company, respondent. [35]

The cause of action arises on a collision between the steamer "Lansing," owned by the libelant, which was lying at a dock, and a tug belonging to the Santa Fe, which tug was maneuvering to get out of the slip, and ran into the "Lansing" and inflicted considerable damage just above the water line, amidship on the port side, while the "Lansing" was lying at a pier.

The suit was brought for the cost of the repairs and for damages due to detention during the period of repairs. The Santa Fe had previously paid the damages arising from the cost of repairs, the amount of the repairs that have been made, so we

admit the payment of that amount, which left to be litigated the liability for the detention.

By stipulation an interlocutory decree was entered in favor of the libelant and the issue of damage arising out of the detention was referred to, your Honor, for the purpose of taking testimony and reporting. That is the only issue in the case. The fault of the Santa Fe tug is admitted and has been found by a decree, as I say, entered by stipulation; and the only issue we have to determine here is the amount of damages, if any, that the libelant suffered by reason of the detention of the "Lansing" during the period necessary for repairs.

Now, the libelant's case on that is this: The "Lansing" is a peculiar vessel. She is owned by the libelant, engaged in the business of whaling. Heretofore this vessel's whaling business has been conducted thru the agency of what are termed killer tugs, which go out and catch the whales and bring them into the land station for reduction, that is, where the manufacture of whale oil and all the [36] rest of the by-products the whale yields, but the "Lansing" was purchased in 1926 by the libelant from the Union Oil Company. It was an old tanker; and was completely rebuilt, or remodeled, rather, and new machinery was installed in it for the purpose of fitting her up as a floating reduction plant. In other words, the killer tugs which go out, of which we will say the "Lansing" is the mother ship, they go out and get whales and bring them to the "Lansing," which may be in any waters, as a floating reduction factory and there the whales are delivered, and all the work which was previously

done on the land is now done on the "Lansing,"—in other words, a floating factory.

Now, the damages which arise out of this detention of the "Lansing" are naturally very much greater than was occasioned by the loss of the use of the "Lansing" itself, because the "Lansing" is the heart of the whole whaling industry conducted by the California Sea Products Company. In other words, if the reduction factory is put out of commission, all the killer tugs, all the business of the concern is absolutely stopped. So our claim for damages, that is, for damages during the period of detention, embraces not only the loss of the use of the "Lansing," but for the whole business of the California Sea Products Company, which was put out of business during the period of detention, for six days.

Now, the question to come up next is this: What did we actually lose in time by reason of these 6 days? As I have told you, the "Lansing" was undergoing a rebuilding, and it is very much like building a house. You can't very well build the roof until the foundations are in, and there [37] was a program that the "Lansing" was following. Certain things had to be done and thereupon certain other things had to be done, but the second series of transactions, or the second series of acts could not be performed until the first series had been completed.

As a result of this collision the work on the "Lansing" had to be entirely suspended, because the work that was then being performed, the work

incident to the collision repairs was in such a condition that the testing of the oil and water-tanks forward could not be continued. The three tanks aft had been completed and had been fully tested, but at the time of the collision these three tanks forward were in the process of being tested and the work was not finished by reason of the collision. Since the collision took place, with the damage just a few inches, or a foot—I think it was about 18 inches above the water-line,—all work of that character had to be entirely suspended for the reason that if the work had progressed simultaneously with the collision repairs the result of continuing these tests and filling these tanks with a thousand tons of water, which is the capacity of each one, would have been to lower the vessel so that the damage done to the collision would have been below the water-line, and the vessel would have filled with water. Had they tried to carry on the testing of the tanks simultaneously with the collision repairs, the vessel would have sunk right there at the dock. The result was that all work necessary to get the "Lansing" ready to go to sea had to be suspended until these collision repairs were completed, and I am going to put on testimony [38] now to illustrate various points that I have explained to your Honor.

Mr. KENT.—I desire to ask a question, if I might, of Mr. Sawyer, at this time. The complaint sets forth that there was a delay of six days, and it is not specified which six days he has in mind. I was wondering if Mr. Sawyer could give me an

idea of which six days damage is sought for. Is that the six days starting from the 15th of November when the accident occurred, or what six days constitutes the period of time during which damages are sought?

Mr. SAWYER.—I will be glad to answer that question, Mr. Kent. If there had been no collision the "Lansing" would have been on the whaling grounds six days earlier than she was on the whaling grounds. The operation of getting the "Lansing" to the whaling grounds was slowed up six days as a result of the collision. What we are claiming is damages by reason of the detention of the "Lansing" for those six days, the damages to be measured by the loss of the six days prior to the time she reached the whaling grounds. That is the only way you con prove your damages.

Mr. KENT.—In other words, your time sought is, assuming that the "Lansing" and the flotilla got to the whaling grounds, we will say, the first of January, you are asking for the demurrage for the six days prior to the date she commenced operations on the grounds? Is that it?

Mr. SAWYER.—Not strictly speaking, no. We are asking demurrage for the six days she was delayed. We are proving the value of those six days by showing that she got to the whaling grounds six days later than she would had this collision not occurred. [39]

Mr. KENT.—You claim, then, the six days from and after November 16, 1926?

(Testimony of F. K. Dedrick.)

Mr. SAWYER.—Right. I think that, technically speaking, our detention is the detention during the period of repairs, but that does not limit us to that period of time to prove our damage. The damage was not reflected until the ship got to sea.

Commissioner KRULL.—Well, we will get the facts and draw the inference from those facts.

Mr. SAWYER.—Of course, I have plenty of authorities to support that, and if you desire I can give them to you at this time.

The COMMISSIONER.—No. You can present them after we have gotten all the facts.

TESTIMONY OF F. K. DEDRICK, FOR LIBELANT.

F. K. DEDRICK was thereupon called as a witness for the libelant, and having been first duly sworn, testified as follows:

Direct Examination.

Mr. SAWYER.—Q. Will you state your name and address?

A. F. K. Dedrick, 332 Pine Street, San Francisco.

Q. Captain Dedrick, what is your business?

A. I am president and manager of the California Sea Products Company.

Q. And the California Sea Products Company is the libelant in this case? A. Yes, sir.

Q. How long have you occupied that position?

(Testimony of F. K. Dedrick.)

A. About 9 years; since the organization of the company.

Q. What is the business of the California Sea Products Company, please? [40]

A. Whaling on the high seas.

Q. Prior to your connection with the California Sea Products Company, what was your business, Captain? A. Shipmaster.

Q. How long have you been following the sea?

A. Oh, from 1884 until 1908.

Q. Do you hold any licenses? A. Yes, sir.

Q. What? A. Captain of ships.

Q. Limited or unlimited? A. Unlimited.

Q. Any ocean? A. Any ocean.

Q. Sailing? A. And sailing ships.

Q. Who owns the steamer "Lansing"?

A. California Sea Products Company.

Q. When did the California Sea Products Company buy the steamer "Lansing"?

A. In June of 1926.

Q. What kind of a ship was she when you bought her?

A. She was a tanker, belonging to the Union Oil Company of Los Angeles.

Q. After you got the steamer, what did you do with her?

A. We converted her into a floating whaling factory.

Q. Had the conversion been completed on November 16, 1926?

(Testimony of F. K. Dedrick.)

A. Well, the equipment was all on board, you know, but the forward cargo tanks had not been repaired and tested.

Q. Just describe that. You say you converted her for whaling purposes. Just describe what changes were made and what the purpose of those changes were.

A. Well, on the after main tanks we placed 16 boilers or digesters; cookers, in other words.

Q. What was the purpose of that?

A. The purpose is [41] to cook the whale meat and blubber and bone.

Q. Right on board the steamer? A. Yes.

Q. And what other changes did you make in the steamer?

A. Well, we put a blubber factory on the forward deck to cook the blubber of the whales.

Q. Now, how far had the work progressed at the time of the collision on November 16, 1925?

A. All the whaling equipment was completed.

Q. And what remained to be done?

A. Just the testing and repairing of the forward tanks in the forward hold of the ship.

Q. What condition were the after tanks in?

A. They had already been completed.

Q. And the forward tanks had not?

A. Had not; no, sir.

Q. What was necessary to do in order to complete the forward tanks?

A. Well, we had to find the leaks in the bulkheads, transverse bulkheads, and that could only be

(Testimony of F. K. Dedrick.)

done by putting water in the tanks to find out where the leaks were.

Q. When you refer to the "transverse bulkheads," you mean the sides of the tanks?

A. The ends of the tanks. The sides, is the ship's side, you see.

Q. And there were three tanks forward that were still to be tested? A. Yes, sir.

Q. What was the capacity of those tanks?

A. They held about a thousand tons of water, each. Number 1, I think, a little more than a thousand tons.

Q. You say you bought the vessel from the Union Iron Works? A. Union Oil Company. [42]

Q. Oh, the Union Oil Company? A. Yes.

Q. Where was the work of conversion done?

A. At the Union Iron Works, Bethlehem Shipyards.

Q. And what firm of contractors, if any, were working upon her?

A. The Eureka Boiler Works.

Q. Do you know who was in charge of the work?

A. Mr. Biggens.

Q. And this collision, as I say, took place on the 16th of November, 1926?

A. Yes, sir, at the south side of the inside berth on Pier 46, Channel Street.

Q. Now, describe for the Commissioner the program or schedule that you were following with the "Lansing" in order to complete this conversion process and get her out to sea; not only what remained to be done as far as the conversion was

(Testimony of F. K. Dedrick.)

concerned, but the various operations that had to be performed before that ship could go to sea?

A. Well, the only work that was to be done was the testing and repairing these bulkheads. As soon as that was done she would load water and fuel oil in those three tanks and then proceed to the stream and take on a lot of coal and fuel oil and get ready for sea. That was the program. And then also we were trying out our new machinery by getting a whale outside, bringing it in and putting it thru the equipment.

Q. And that was the plan you had in mind?

A. That was the program from the beginning, yes.

Q. Now, do you recall when you expected to have the "Lansing" leave Pier 46 for the purpose of going into the stream and loading coal and fuel oil?

A. Well, in order to [43] satisfy the people that have charge of the wharf down there,—I think it is Grace & Company, who have charge of the wharf,—I think it is the Panama Line, and Grace steamers. They dock there and receive freight there, and it is a pretty busy pier, and they continually wanted to know when we would be ready to leave the pier, so it was some time before the collision we had decided that unless we ran into something unlooked for in the repairs of these forward tanks, that we would be able to leave the pier about the 20th of November.

Q. And if you had left the pier on the 20th of November, would you then have been fully ready to go to sea with the "Lansing"?

(Testimony of F. K. Dedrick.)

A. No, sir. We would have had to go and fill up with water, which we did after the tanks were finished, then proceed to the stream and take on three hundred tons of sacked coal, or six or seven thousand barrels of fuel oil. I don't remember exactly how much oil we took.

Q. You are familiar, in a general way, with the damage that was caused by reason of the collision with the Santa Fe tug?

A. Yes. I have looked at it.

Q. Where was the damage?

A. It was in the wake of the boiler-room, 'midships, right opposite the boiler-room, 'midships.

Q. On the port side? A. On the port side.

Q. What did the damage consist of?

A. Well, it was dented plates, you know, causing a hole in the side.

Q. How far above the water line was that?

A. I believe it was from 15 to 20 inches.

Q. What effect did the collision and the necessary consequent repairs have upon the carrying out of your schedule with [44] regard to getting the "Lansing" ready for sea?

A. It took us that much longer to make the repairs.

Q. Why couldn't you have done other things simultaneously while the collision repairs were going on?

A. Well, of course, in order to effect the repairs we had to put a thousand tons of water into one of these tanks in order to test the bulkheads in either end of the tanks.

(Testimony of F. K. Dedrick.)

Q. Effect what repairs?

A. Repairs to the bulkheads and the tanks.

Q. My question is, Captain, why was it that you could not have done other work on your schedule simultaneously with the making of the collision repairs?

A. There was no other work to do, except the repair of the tanks.

Q. Well, the collision repairs were made, as a matter of fact, while the vessel was lying at Pier 46. Isn't that so? A. Yes.

Q. That is, the Eureka Boiler Works came out there and made all the repairs while the vessel was right there at Pier 46? A. Yes.

Q. Now, why couldn't you have continued at the same time the work of testing the tanks?

A. Because the ship would have sunk there. The hole in the side of the ship would have been under water.

Q. What would have put it under water?

A. Putting a thousand tons of water in the forward end of the ship would have put the damaged part under water.

Q. Well, why couldn't other operations of the program have been transposed and been performed simultaneously with the making of these collision repairs? [45]

Mr. KENT.—Just a minute. I would object to that because it seems there were other things to be done. The witness said there was only the testing of the tanks to be done.

(Testimony of F. K. Dedrick.)

The WITNESS.—There was a lot of things to be done after we got out in the stream.

Mr. SAWYER.—I am trying to find out whether they could not have found time to shift aft and do whatever work was necessary back there; whether they couldn't have done that while the collision repairs were going on?

The COMMISSIONER.—The witness may explain why he had to wait. Why did you have to wait for the other repairs to be made?

The WITNESS.—The repairs to the tank, you mean?

The COMMISSIONER.—Yes.

Mr. SAWYER.—Q. Explain that in your own way.

A. Why, we had to wait for the repairs before we could go ahead and test the tanks and repair the bulkheads, repair the leaks. Of course, we couldn't put any water in the forward tanks in order to test the bulkheads,—the bulkheads that we found needed repairing and if we had gone ahead and put a thousand tons of water in those forward tanks, the whole of the ship's side would have been under water and she would have sunk.

The COMMISSIONER.—Q. Were there any other repairs that you could have gone on with during the time the collision repairs were being made?

A. There were no other repairs to be made except that,—except testing the forward tanks and repairing the leaks in the bulkhead, while she was at the pier, and then we was going to take her out in the

(Testimony of F. K. Dedrick.)

stream, [46] which was a part of our program, after we got away from the wharf; we was going to take on coal and fuel oil and supplies.

Q. Is that the only place you could take on supplies,—out in the stream?

A. We couldn't take them on alongside; there was no room for a ship to pass by. They couldn't bring a barge alongside where we were laying at the inner berth on the south side of Pier 46; there wouldn't be room enough from there to the other side of the channel for another ship to pass by. It couldn't be done. And, anyhow, we couldn't have put the coal and fuel oil in the forward end of the ship while the repairs were going on, because the hole in the ship's side would have been under water.

Q. She didn't have to go into dry-dock at all to make the repairs occasioned by the collision?

A. No.

Q. And those repairs were made and that work was carried on at the time you were lying at Pier 46?

A. Yes. And we stopped our work in the forward tanks as soon as the collision took place, so we couldn't do anything more, because we had to test the tanks; we had to fill the tanks. For instance, if we had the tank full of water, say, Number 1,—there is Number 1, Number 2 and Number 3; they each hold about a thousand tons of water. Now, if we want to test the bulkhead between Number 2 and Number 1 and between Number 2 and Number 3,—we had to put water in Number 2 tank and fill

(Testimony of F. K. Dedrick.)

it up so as to get pressure on these bulkheads in order to discover the leaks.

Q. Well, when you afterwards made these tests, Captain, [47] did you discover there were repairs that had to be made to these bulkheads?

A. Yes. When we put the water in, then we go on the other side of the bulkheads and then we discover the leaks, and then we have to let the water out again and make the repairs, stop the leak.

Q. Did it take any great length of time to locate those leaks?

A. Yes; longer than we thought in the first place. We thought we would be able to leave Pier 46 on the 20th, and I forget the day we finally did get away.

Mr. SAWYER.—Q. I think it was December 8.

A. No, the 7th; I believe December 7th. It took us a great deal longer because new leaks cropped up right along as we kept testing the tanks, and we didn't get away from there until December 7th.

Q. The collision took place early in the morning, didn't it, Captain?

A. One o'clock in the morning, I think.

Q. That was on the 16th of November?

A. On the 16th of November, yes.

Q. Now, when were the repairs completed; do you know?

A. On the 22d, I believe; on the following Monday, if I remember right.

The COMMISSIONER.—What was the date of the collision?

(Testimony of F. K. Dedrick.)

Mr. KENT.—November 16, 1926, 1 A. M.

The COMMISSIONER.—And when were the repairs completed?

Mr. KENT.—The repairs were completed—correct me if I am wrong—I believe were completed at 5 P. M. on November 22d of the same year. That is subject to correction, but I understand it is 5 P. M. [48]

Mr. SAWYER.—Q. You were present, Captain Dedrick, were you, during the time the work was going on on board the "Lansing"?

A. Yes; I was right here in San Francisco.

Q. And were you down there every day?

A. Yes, every day.

Cross-examination.

Mr. KENT.—Q. Captain, you stated that you had qualified as a ship's master in sail, that is in sailing vessels?

A. Yes.

Q. And you had been employed in sailing vessels up to the time you were— A. Up until 1908.

Q. At which time you joined the California Sea Products Company?

A. No. I engaged in business in Gray's Harbor, Washington.

Q. I see. And then you went with the California Sea Products Company, when? A. 1918.

Q. And the "Lansing" was acquired in June of 1926? A. Yes.

Q. And previous to that date had the California

(Testimony of F. K. Dedrick.)

Sea Products Company owned a vessel of that character or was their reduction business carried on on shore?

A. On land, yes. We had two land stations, you know, shore plants.

Q. You were in charge of the job, were you?

A. Well, I was manager of the company, and naturally I am in charge of everything, see?

Q. And you were in charge, then, of the "Lansing"? It was directly under your supervision and control? A. Yes, sir.

Q. Now, you stated that the equipment was all on board and that all of the work had been completed, with the exception, [49] as I understand it, of the testing of the forward tanks. Is that correct?

A. Yes; that is, all the equipment pertaining to handling whales, of course, was on board. We had still quite a lot of supplies to take on board.

Q. I was going to say the ship as a unit was complete? A. Yes.

Q. With the exception of the testing of the three forward tanks? A. That is it, exactly.

Q. You still had some supplies to take on board?

A. Yes; three hundred tons of coal was one item, sacked coal, furnished by the King Coal Company.

Mr. KENT.—Mr. Sawyer, have you a plan of the ship showing the tanks?

Mr. SAWYER.—I haven't one with me, Mr. Kent. I don't know whether we have one or not.

The WITNESS.—Yes, we have them on board

(Testimony of F. K. Dedrick.)

the ship. I could have brought them in if I had known you wanted them.

Mr. KENT.—I should like to have a diagram or blue-print of the ship, if possible. It would save some time in the cross-examination of this witness.

The WITNESS.—You wouldn't be able to get it right away because the ship is in Alameda.

Mr. KENT.—I didn't mean immediately. But I should like to get it at your earliest convenience.

The WITNESS.—You can get it any time. We have them on board.

Mr. KENT.—Q. You were going to sea to fill up with 300 tons of coal?

A. Out in the stream, yes.

Q. I mean out in the stream?

A. Yes. That is one item, [50] additional to the fuel oil. We had to take the fuel oil and water, you know, in the very same tanks we were testing at the time of the collision.

Q. Yes. That is, you were going to get the coal first. You were going to take on 300 tons of coal?

A. After we got out in the stream,—from a barge.

Q. And did you take on 300 tons of coal?

A. Yes; finally.

Q. How long did it take you to get the 300 tons on board? A. I really don't know.

Mr. SAWYER.—I submit, Mr. Kent, and I don't want to be technical, but I don't think that is proper cross-examination because I didn't ask him anything about that. I wanted to carry it on chronologically from the time the tanks were com-

(Testimony of F. K. Dedrick.)

pleted, according to our log, and then I was going to recall the captain.

Mr. KENT.—My thought was that the witness was interrogated with respect to taking on 300 tons of coal. It seems to me it would be material to know how long it would take to put it on board.

The COMMISSIONER.—I see no objection to having that shown. I just want to get the facts.

Mr. KENT.—Q. The question is, Captain, how long did it take you to get the 300 tons of coal on board?

A. I think it took us about 4 days out in the stream, if I remember right.

Q. And the coal was furnished by what concern?

A. By the King Coal Company. We took it on board in two lots. Now, in connection with that I might say it took us longer than it should have, for the simple reason that while we were doing the repairs on the side of the ship, this coal had been held out on the barges over at the King [51] Coal Company's bunkers in Oakland, and we had a rain storm there for one or two days and the sacks got all wet and they got rotten before we took them on board. So when we finally did get the barge alongside of the ship out in the stream the sacks all fell to pieces and we had to resack the whole cargo of 300 tons and it took that much longer than it would have taken if the collision hadn't happened and these sacks wouldn't have been left in the barges as long as they were and the rain storm hadn't come up and damaged the sacks we would have

(Testimony of F. K. Dedrick.)

taken that coal on board in shorter time than we did, because the coal had to be all resacked before it could be taken on board.

Q. When did you take delivery of the coal, Captain?

A. I don't remember exactly the date, but the log-book will show that. It was somewhere between the time that we arrived in the stream and the time that we left for California City.

Q. And you had nothing to do with the coal up to the day you received it, did you?

A. We had nothing to do with it,—of course not. The coal was all delivered alongside of the ship by barge.

Q. Delivered alongside the ship? A. Yes.

Q. By the King Coal Company?

A. The King Coal Company.

Q. Now, as to the fuel oil, Captain. Where was that taken on board?

A. That was also taken on board out in the stream at the same time the coal was taken on board.

Q. From what company was the fuel oil purchased? A. Standard Oil.

Q. And how was that taken on board?

A. Pumped on board [52] by the barge that brought it.

Q. And what size equipment was used in that?

A. The barge's equipment, with a hose on board, sticking into our tank and pumped it full.

Q. You don't know what size hose was used?

A. About six inch.

(Testimony of F. K. Dedrick.)

Q. What barge was this?

A. I can't remember the name of the barge, but that can be easily ascertained.

Q. As to the damage to these tanks, Captain, you stated,—by the way, do I understand you to say that the defects in the tanks were because of this accident? A. No, I didn't say that.

Q. Well, were they or were they not?

A. You mean the defects to the bulkheads, the leaky bulkheads?

Q. Yes.

A. Were they caused by the accident of the Santa Fe tug running into the "Lansing"?

Q. Yes. A. No; had nothing to do with it.

Mr. SAWYER.—We never denied that.

Mr. KENT.—I didn't think the witness made it clear. He referred to the various defects in the bulkheads, and there was the inference, at least, that the damage was due to the accident.

The WITNESS.—No; because we were working on the bulkheads at the time of the accident, and we knew they were leaking then and that couldn't have had anything to do with them,—the accident.

The COMMISSIONER.—Q. How long had these bulkheads been in there, Captain?

A. That, I couldn't say. It was converted [53] into a tanker in New York after she was built. She was built in England, but what year, I can't remember now; but I can easily get that for you.

(Testimony of F. K. Dedrick.)

Q. I just wanted to know. It was some time prior to the accident, anyway? A. Yes.

Q. And they had been used?

A. Oh, yes; had been used by the Union Oil for many years. But I may explain this, that it didn't matter so much to the Union Oil Company that they had leaky bulkheads, because thew carry bulk oil and if the oil ran from one tank to the other it didn't matter; but we had to carry water in one tank and fuel oil in the next one and we couldn't have water and fuel oil getting mixed by leaky bulkheads. In other words, we couldn't have the oil running into our fresh water that was used on board the ship; neither could we have water getting into the oil. That is why the repairs were being effected.

Q. And the vessel was laying alongside there for the purpose of making repairs to the bulkheads at the time of the collision; is that true?

A. Yes, your Honor.

Mr. KENT.—Q. Well, Captain, were the repairs to the bulkheads in these tanks under your jurisdiction? Were you handling the work?

A. I didn't handle the water. I was out there and watched it.

Q. By that I mean were you supervising the job?

A. Yes, sir. Absolutely. I was there nights, too, when they worked nights I was there.

Q. And then the men were working under your supervision, or under your direction?

(Testimony of F. K. Dedrick.)

A. Not under my direction; Mr. [54] Biggens' direction, of the Eureka Boiler Works.

Q. However, if you were in charge of the work you could have directed anything to be done that you wanted done? You were sufficiently in charge of the work so you could have done or had done anything you wanted done; is that correct?

A. Absolutely.

Q. Now, just what was done to the tanks, Captain?

A. Well, whenever we discovered the leaks they had to be calked up or be welded.

Q. Now, answer the question directly, what was done? After the collision on November 16, just exactly what was done to the tanks?

A. What was done during the repairs to the collision damage?

Q. Yes; what testing?

A. There was no testing being made during the repairs to the collision damage; it couldn't be done, because we couldn't put any water in the tanks to test the bulkheads.

Q. Your test was the filling of the tank with water, was it? A. Absolutely.

Q. And where did you get the water?

A. From the sea; from the bay. We pumped it with our own pumps into the tanks from the bay.

Q. You pumped it into the tanks?

A. Yes; sure.

Q. Well, when was that done?

(Testimony of F. K. Dedrick.)

A. Whenever it was required to test the bulkheads.

Q. I say, when was it done with respect to these three tanks?

A. It was done two or three times before the collision, and we would always find any leaks that were in the bulkheads and then we would have to let the water out [55] again and then put it in again when that particular repair to that corner was made. After that was done and the leaks had been stopped, then we would have to pump the tank full again and try it again.

Q. Will you state, please, if you can, when these tanks had been pumped full of water previous to the accident?

A. I can't tell you the day and hour those tanks were filled. It was done this way. Now, suppose we fill the tank to-day—

Q. No; just a minute. Answer the question. I asked you how many times the tanks had been filled with water before the collision?

A. I couldn't tell you that; it is impossible, but they had been filled.

The COMMISSIONER.—Q. Can you tell us approximately the number of times?

A. I don't know. Mr. Klein,—he has charge of that. He can tell.

Q. Well, never mind, then, as long as he is here to testify.

A. I wasn't there to supervise every little bit of a job that was done on the bulkhead. I was there

(Testimony of F. K. Dedrick.)

when the tank was filled and then we had to go around on the other side and look for leaks. If there was a leak on the other side, we had to take the water out and repair the leak and then put the water in again to see whether there were any other leaks. We did that half a dozen times or more.

Mr. KENT.—Q. Then you will say this much, that the tanks had been filled one or more times prior to the accident?

A. Absolutely, yes.

Q. And then after the tank was filled, then you would proceed to see where the leak occurred and would repair it? [56]

A. And then let the water out again so we can repair it. We couldn't repair it with the water in. The water had to be let out again first. Then when that repair was made we had to pump it full again and try it again.

Mr. SAWYER.—Q. And that was what you were doing at the time of the collision?

A. And kept right on doing that right along, working nights, even.

Mr. KENT.—Q. Perhaps you can tell me how many times the tanks were filled and emptied after the collision until you got them tight?

A. I can't tell you how many times; but it took us from November 23d until the day that we left for the big water main on the Santa Fe wharf in order to fill the tanks with fresh water. We probably crossed the channel on the 7th.

Q. The 7th of what month?

(Testimony of F. K. Dedrick.)

A. Of December,—6th or 7th; the log will tell you that.

Q. What day did you finally sail from San Francisco?

A. The 16th of December. I believe we went across the channel on the 7th and we loaded water all night and went out of there on the 8th, if I remember right. We had to do that because the wharfinger wouldn't let us lay there only overnight.

Q. Now, you stated, Captain, that new leaks appeared in these tanks after the accident?

A. Yes.

Q. Just what reason was there for that?

A. I can't tell you that at all. It is the pressure made on the bulkheads by filling the tanks with water that makes it possible for us to discover the leaks. You put a thousand tons of water in a deep ship like that and little leaks will show up and [57] you have got to tighten it up again, but you first have to let the water out before you can make the repairs; then you have to pump it again, pump it full again.

Q. And it is possible every time you load the tanks with a thousand tons of water you will probably find some additional leakage?

A. We did up to the time we finally got them tight.

Q. You have had no trouble with the tanks since that?

A. No trouble whatsoever. We have used water and fuel oil in them ever since.

(Testimony of F. K. Dedrick.)

Q. You never had any repairs to them since?

A. No, never made any repairs.

Mr. KENT.—I think that is all, with the exception of the fact that we would like to get that diagram of the vessel. We will get that?

Mr. SAWYER.—Oh, yes; surely.

Redirect Examination.

Mr. SAWYER.—Q. Previous to your purchasing the "Lansing" you had land reduction plants, had you not?

A. Yes.

Q. Can you tell me whether these plants were in operation during the time the "Lansing" was undergoing repairs?

A. Well, they were in operation in the summer of 1926, that is, the Trinidad plant was. They operated up there until, I think, the middle of November or the end of October,—something like that. I can't recall the date.

Q. The Trinidad plant is up near Eureka?

A. Yes; it is 30 miles north of Eureka.

Q. I suppose its operation depends on the catch of whales, [58] does it? A. Yes.

Q. And these whales run in seasons up there until that time? A. Yes.

Q. Tell me whether or not it was the beginning or the end of the season at the time the "Lansing" was undergoing these collision repairs at Pier 46?

Mr. KENT.—Just a minute. I don't quite see

(Testimony of F. K. Dedrick.)

the materiality of the season at Trinidad, as far as the "Lansing" is concerned.

Mr. SAWYER.—I am just merely showing there was no reduction plant they could have used in substitution of the "Lansing."

The COMMISSIONER.—Q. Answer the question.

A. That depends on where you are, Mr. Sawyer; where you operate, as to seasons. Take, for instance, in Alaska you can only operate in the summer-time up there. Take down here off San Clemente, in Southern California, you can operate there the whole winter if you want to, if you find any whales down there.

Mr. SAWYER.—Q. What I am getting at, Captain, is this: I want to know whether these reduction plants could have been operated, so to say, in lieu of or substitution of the "Lansing" during the period of the collision repairs?

A. No. It was after the season.

The COMMISSIONER.—Q. Had you any definite place in mind for the operation of the "Lansing" at that time?

A. Yes. We had decided where to send her, where to operate.

Mr. SAWYER.—Q. Following up the Commissioner's idea, where had it been planned, prior to the collision, to operate the "Lansing"? [59]

A. Off San Clemente Island, off San Pedro, Southern California.

Q. When was that plan made?

(Testimony of F. K. Dedrick.)

A. That was made early in the summer, you know, when they were reconstructing the "Lansing." We realized it would be too late to go to Alaska so we had to go down to Southern California.

Q. Now, with regard to the fuel oil and coal; when was that coal ordered, approximately?

A. I couldn't tell you exactly when it was ordered. It was ordered quite a long time previous to our getting it because it had to be all sacked over there in Oakland and put on a barge.

Q. Well, I don't want to lead you, Captain, but I want to find out approximately what month it had been ordered?

A. It must have been ordered in November, the latter part of November.

Mr. SAWYER.—Now, Mr. Kent, if you are interested in this fuel oil, as to when it was ordered, or when it was placed on board, I will produce the records. I can get them from the Standard Oil Company here. We haven't got any of our own.

Mr. KENT.—It may be material later. I will ask for it if it is.

The WITNESS.—Mr. Sawyer, regarding these rotten sacks, it may be pointed out that we didn't really lose any time on account of the coal being resacked and taking it on board, because while it was being resacked we went thru on our program, and waited there for a whale, and we went to California City and waited for a whale to come in, and

(Testimony of F. K. Dedrick.)

then we came back [60] and took on the resacked coal.

Mr. SAWYER.—Q. Yes. But the fact of the matter was that it took you longer to load the coal than it would have otherwise done?

A. I did. If these sacks hadn't rotten*e*d we would have been able to load the coal in the first place. We did the best we could until we gave it up. We told them to resack it and we would take it on after we came back and we took it on after we came back from California City.

Q. But you did not lose any time by reason of the resacking of the coal? A. No.

Recross-examination.

Mr. KENT.—Q. In connection with that statement, Captain, you were going to get a whale, I think you said you were going to California City to get a whale, and you said something about your program, too. What was your idea?

A. Why, that was our program. We put on board a lot of new machinery,—cookers, slicers, conveyors, pipes and so forth, and our program was this from the beginning: That as soon as we had this equipment installed and ready for operation in San Francisco we would send one of our whalers outside of the Farallones or Point Reyes and bring in a whale and put that whale thru our equipment to see if everything worked all right before we went to the whaling grounds. That was our intention right along and that is what we did;

(Testimony of F. K. Dedrick.)

while we were waiting for the coal to be resacked we went to California City and waited there three or four days, waiting for a whale. We had sent the "Hawk" out to bring in a whale and we were waiting there for the whale to be brought in.

Q. And you sent the "Hawk" out in due course of time and got [61] the whale?

A. Well, she didn't bring it in, because she didn't get any; and it was too expensive to lay her up there too long, to lay the "Lansing" up there too long, so we got ready and went to sea without trying the machinery out.

Mr. KENT.—That is all.

The COMMISSIONER.—Q. Was this vessel a success after she went into the service, into the whaling business?

A. Yes, sir; she was a success. She has been operating for over a year now.

(Witness excused.)

TESTIMONY OF WILLIAM JOSEPH BIGGINS, FOR LIBELANT.

WILLIAM JOSEPH BIGGINS was thereupon called as a witness by the libelant, and having been duly sworn, testified as follows:

Direct Examination.

Mr. SAWYER.—Q. Will you state your name and address?

A. Joseph William Biggins; 645 Charter Oak, San Francisco.

(Testimony of William Joseph Biggins.)

Q. What is your business, Mr. Biggins?

A. Superintendent for the Eureka Boiler Works.

Q. What is the business of the Eureka Boiler Works? What do they do?

A. Well, they build boilers, repair ships,—anything in that line of business.

Q. What connection did you have, if any, with the steamer "Lansing" at or about the time she was purchased by the California Sea Products Company or shortly thereafter?

A. Well, we were doing repairs on the steamer "Lansing" at the time. After we built the digesters and the blubber pot we installed them on the ship. [62]

Q. Well, that is to say,—you heard Captain Dedrick's testimony, did you? A. Part of it.

Q. Well, you heard the last part of it; you were here when he was talking about the reconversion of the "Lansing"? A. Yes.

Q. That reconversion of the "Lansing" was built by your firm,—it built the machinery, rather, and installed it? A. Yes.

Q. Where was the "Lansing" when you began to do that work?

A. On the south side of Pier 46.

Q. No. I mean when you commenced to *installed* the digesters?

A. She was lying at the Bethlehem Shipyards when we first started.

Q. That is what I am trying to get at. Where was she when you first started work?

(Testimony of William Joseph Biggins.)

A. She was lying at the Bethlehem Shipyard in the Potrero.

Q. What work did you do on her over there?

A. Well, if I am not mistaken, I think they put the blubber tanks in.

Q. By the way, Mr. Biggins, did you bring your records with you? You can always testify from your records, or refresh your recollection?

A. Beg pardon?

Q. I asked you the other day to bring your records? A. No, I didn't bring them.

Q. You didn't bring any?

A. I forgot all about it until to-day that I had to come up this morning. I took a look just about 12 o'clock just to get it in my mind when this thing happened.

Q. Well, we are going to be very much handicapped without Mr. Biggins' records. [63]

A. What records would you want, Mr. Sawyer?

Q. I want your time sheets.

A. Possibly I could go down and get them now.

Q. How long would it take you?

A. About 15 minutes.

Q. Get your sheets for the whole "Lansing" job from the time you started until you finished.

A. All right.

(Witness withdrawn.)

TESTIMONY OF MARTIN SWANSON, FOR LIBELANT.

MARTIN SWANSON was thereupon called as a witness by the libelant, and having been duly sworn, testified as follows:

Direct Examination.

Mr. SAWYER.—Q. State your name and address, Captain.

A. Martin Swanson, 1247–40th Street, Oakland.

Q. What is your business, Captain Swanson?

A. Shipmaster.

Q. Are you a licensed officer? A. Yes, sir.

Q. What license do you hold?

A. Unlimited; sail and steamer.

Q. By whom are you employed

A. California Sea Products Company.

Q. What is your present post?

A. Master of the "Lansing."

Q. How long have you been master of the "Lansing"? A. Since she commenced to operate.

Q. When did you join the ship; do you remember?

A. The 1st of November, 1926; first or second.

Q. 1st or second of November, 1926? A. Yes.

Q. As master of the "Lansing" from the 1st of November, 1926, [64] did you have anything to do at all with the work that was going on in the reconversion of the "Lansing" into a floating whale reduction plant?

A. Well, not the work below deck, of course; but above deck, yes.

(Testimony of Martin Swanson.)

Q. Now, were you on board the "Lansing" at the time of the collision of the Santa Fe tug with the "Lansing" on November 16, 1926?

A. No. I came aboard in the morning at 7:30 o'clock.

Q. Did you see the collision damage? A. Yes.

Q. Describe it, please.

A. Well, there was a dent,—I should say at about 4 feet above the water-line, where the big dent was, and the plate was dented downwards, of course.

Q. How far above the water-line?

A. Well, about four feet, I guess, where she hit.

Q. Well, are you talking about the light load-line or the water-line? A. No. The water-line.

Q. How far above the light load-line was it?

A. I could not say that.

Q. Were you with the ship when the repairs due to the collision, were made by the Eureka Boiler Works?

A. Yes, I was there on the ship every day.

Q. You saw that work as it was progressing?

A. Yes.

Q. Do you know what the Eureka Boiler Works still had to do with regard to the tanks at the time that the collision took place?

A. They were working on the forward tanks when I came aboard.

Q. On the forward tanks? A. Yes.

Q. And did they continue working on the forward tanks during the time the collision repairs were being made? [65] A. No.

(Testimony of Martin Swanson.)

Q. Could they have done so?

A. No, they could not.

Q. Why not?

A. Well, they couldn't work on account of the water coming in thru the damaged part.

Q. I don't understand you.

A. Well, the plate was dented down, you know.

Q. You mean there was a hole?

A. The lower part of the plate was pulled apart for a foot or 15 inches above the water, where she was run into. That was taken out, that plate was taken out.

The COMMISSIONER.—Q. The plate was taken out to straighten it?

A. The plate was taken out to straighten it, yes.

Mr. SAWYER.—Q. And that left a hole?

A. Yes, that left a hole. They took out two plates.

Q. What would have happened if they had continued working on the tanks while they had these plates off? A. The vessel would have sunk.

Q. Why?

A. Because it was too close to the water.

The COMMISSIONER.—Q. You mean it would have filled with water?

A. Yes.

Mr. SAWYER.—Q. I was trying to get at this: What effect on the displacement of the ship would the filling of the tanks have?

A. It would lower the ship.

Q. Lower the ship. And where would your hole

(Testimony of Martin Swanson.)

be in the side of the ship—above or below the waterline? A. It would be below.

Q. Now, Captain, assuming that on December 8th the Eureka Boiler Works had got thru with all of this tank work, that the tanks were finally determined to be tight and sound, [66] complete—now, refresh your recollection from your log?

A. This is the mate's log, you know; first officer's log.

Q. You have seen it. It is kept under your direction? A. Yes.

Q. You saw it every day, didn't you? A. Yes.

Q. And you looked it over? A. Well, I did, yes.

Q. Well, begin on December 10th. You signed it, didn't you? A. Yes, I signed it.

Q. Whose handwriting is this entry in on December 8th?

A. That is Mr. Thompson, the first officer at that time.

Q. Is he with the ship now?

A. He went away; he left and Mr. Wallace took his place.

Q. On December 11th? A. Yes.

Q. Now, read me that entry on December 8th?

A. December 8th, 8 A. M., rigging booms and gear for action; going into the stream; 1:15 P. M. left for the dock assisted by two tugs, two tugboats; dropped anchor; left the dock; two tugboats; dropped anchor off Pier 46; 75 fathoms of chain in water; that is, the shackle in the water; strong northwest wind blowing; crew cleaning up decks.

(Testimony of Martin Swanson.)

Q. On December 8th, according to the entry in your log, you left Pier 46 and anchored in the stream off Pier 46? A. Yes, off of Mission Rock.

Q. Off Mission Rock? A. Yes.

Q. That was the first time you left Pier 46 from the time of the collision?

A. Yes, that was the first time.

Q. And all your work at Pier 46 was then done?

A. Yes, sir.

Q. Now, take up the next day and read the entry. He is reading [67] the full log.

A. This is December 9th. This day commences with fresh northeast wind and clear weather. All hands working chipping rust and rigging up gear and cleaning decks: anchor lights attended to.

Q. Now, go right ahead with your log, Captain.

A. December 10. This day commences with a light northerly wind and clear weather; crew working chipping rust, painting and making fenders.

Q. Now, all the entries you have so far read were in the handwriting of Mr. Thompson? A. Yes.

Q. Who was the second officer at that time; is that right? A. He was chief officer.

Q. He was chief officer? A. Yes.

Q. Now, the handwriting changes. In whose handwriting is this entry of December 11?

A. Mr. Wells'.

Q. And Mr. Wells was who?

A. First officer in Mr. Thompson's place.

Q. I see. Go ahead and read your entries right along.

(Testimony of Martin Swanson.)

A. December 11th. Crew working taking aboard coal and chipping rust. Dismissed coal barge at 5 P. M. Watchman on duty. Anchor lights O. K. M. Swanson, second mate." That is the second mate, that is, before Mr. Wells came.

Q. And your name is Swanson, too? A. Yes.

Q. That is not your signature?

A. No. That is the man that was second mate. We had no mate for one day, according to this. He came on Sunday morning, I think. Yes; there is Mr. Wells' name,—December 12. Crew working coal.

The COMMISSIONER.—Are you interested in December 12th? [68]

Mr. SAWYER.—From my theory of the case I want to carry out the movements of this ship right out to the time she went to sea, to convince you and Mr. Kent that our schedule was interrupted.

The COMMISSIONER.—All right, proceed.

Mr. SAWYER.—Q. Go right ahead, Captain.

A. Sunday, December 12th. Crew working coal. Finished at 10 A. M. on Sunday. 12:45 lifted anchor for California City.

Q. Now, Captain, what were you going to California City for? A. To carry out the program.

Q. Of doing what?

A. Working a whale if we got him.

Q. To test out your reduction machinery?

A. Yes, sir.

Q. That is it? A. Yes, sir.

Q. Now, go right ahead. All I want to say is

(Testimony of Martin Swanson.)

that we have gotten then over to California City now on Sunday, December 12th. Is that right?

A. Yes.

Q. Proceed.

A. And on Monday, December 13th, the steamer was laying over there waiting for the "Hawk" to bring in a whale and at the same time was receiving stores aboard from the launch "Peterson" and the crew was storing the same; and on the 14th they were still at California City; received 20 kegs of black powder on that day. And on the 15th at California City the launch "Peterson" came alongside with stores and orders and they left California City at—anchor was up at 1:30 in the morning, and came back off Pier 46 in the stream at 11:50 in the morning; the launch "Peterson" was alongside at 1 P. M. with blacksmith equipment; the launch "Peterson" was alongside at 2:15 with pumps; at 2:30 the coal barge, "King Number 3," was alongside and finished with [69] the coal at 7:30 in the evening. On Thursday, the 16th of December, at 10:20, the "Port Saunders" was alongside and the blacksmith Jones came aboard. 3 P. M. launch "Peterson" again alongside with stores; and 3:25 they heaved anchor into the 45 fathom mark, and at 4:45 they heaved anchor and the ship was under way outward bound at 4:45 P. M.

Mr. SAWYER.—You may cross-examine.

Cross-examination

Mr. KENT.—Q. Captain, you stated that you

(Testimony of Martin Swanson.)

were a master qualified to handle any equipment on any ocean; is that correct?

A. Yes.

Q. And previous to your employment by the California Sea Products Company, what type of vessel had you been engaged in handling?

A. United States Shipping Board.

Q. And what ships were those; freighters?

A. Yes, all freighters.

Q. Steam? A. Yes; and motor.

Q. Had you ever been employed on any tankers before? A. No, not before.

Q. And had you ever had any experience in the handling of a floating factory like this before?

A. No, sir.

Q. You referred to the accident, or the damage to the "Lansing" as being close to the water-line; just what line did you have in mind?

A. What she was drawing at the time.

Q. That was the line where the water actually was at the time the collision occurred?

A. Yes, sir.

Q. And how high above the water were the plates dented?

A. Well, where the tug hit her, I should judge, was about [70] four feet; but there was a gap, you know, in the plate, which let the water in, and that went down a good deal more. I couldn't say exactly, you know. When the plate was taken out I should judge it was about 15 inches above the water. The water was then washing in when tug-

(Testimony of Martin Swanson.)

boats or small boats came by,—just a little. Of course, when the tide is in and the wind would come up and when small boats went by the water would be thrown up.

Q. Then your best judgment is that the tug had hit the "Lansing" about four feet above the water-line, approximately?

A. Maybe a little less. I didn't measure it with a rule.

Q. But it was approximately four feet above the then water-line? A. Yes.

Q. And that the damage extended down to within about 15 inches of the water?

A. Yes, I should judge.

Q. Now, you referred to certain entries here in the log from December 8th to the 12th, inclusive. I think you stated that on December 8th the crew was engaged in rigging booms and cleaning up the decks; and on the 9th, chipping rust and attending to the rigging; and on December 10th, painting was done; some fenders were being made and general chipping of rust. As a matter of fact, that chipping of rust goes on whether the ship is ashore or at sea?

A. Yes.

Q. That is part of the regular job of the crew?

A. Yes.

Q. Rigging booms and cleaning up decks; that can be carried on at any time, can it not?

A. Not the rigging of booms, I would say. We usually lower them down at sea; but you can't raise the booms. [71]

(Testimony of Martin Swanson.)

Q. Is there any reason, Captain, why the rigging of those booms could not have been done while the vessel was at Pier 46?

A. They probably didn't need them down. If some cargo is taken aboard, you need them.

Q. Now, the painting of the ship, generally speaking, and the making of fenders is also a general job which the crew carries on at any time?

A. That is the general routine work aboard any ship.

Q. And on December 12th you went to California City and there waited for a whale? A. Yes.

Q. Do you know when the "Hawk" went out to get the whale?

A. I could not say. A day or two ahead.

Q. You don't know? A. No, I don't.

Q. The log doesn't show that?

Mr. SAWYER.—No. That isn't the log of the "Hawk." That would be in the log of the "Hawk."

Mr. KENT.—I thought possibly you considered the organization as one ship, as you might say; that is all.

Mr. KENT.—Q. You have no independent recollection?

A. No. Each ship keeps their own log.

Q. And you have no independent recollection as to when the "Hawk" went out, except that she went out a couple of days before? A. I guess she did.

Q. And you waited there for the "Hawk" to come in? A. Yes.

Q. Did she finally come in?

(Testimony of Martin Swanson.)

A. No; she didn't come to California City.

Q. What happened to the "Hawk"?

A. She was out looking for a whale but didn't get any. [72]

Q. Didn't get any? A. No.

Q. And how long did you wait at California City for her?

A. Four days in California City—No, three days.

Q. And the "Hawk" still didn't get the whale?

A. No.

Q. And you gave up waiting for the "Hawk" then and proceeded?

A. Well, the plan was given up to wait for her and I got orders to proceed back to Mission Bay and take in the balance of the coal,—from Captain Dedrick.

Redirect Examination.

Mr. SAWYER.—Q. As a matter of fact, Captain, on December 8th, didn't you take on board fresh water?

A. No. We left the dock in the morning on December 8th.

Q. Where did you go?

A. Out in the stream off Mission Rock.

Q. Isn't it true that some time or other you took on fresh water at the Santa Fe dock?

A. We took on fresh water on the south side.

Q. At Pier 46?

A. No, no; on the other side; on the south side.

Q. Didn't you have to move over there?

A. Yes.

(Testimony of Martin Swanson.)

Q. When was that done?

A. We moved on the 7th, in the afternoon, I think.

Q. Look at your log there and see if it shows you. Read your entry for the 7th?

A. December 7th, rigging up gear, chipping rust; 4 P. M. moved across channel for filling water at 5:15 afternoon. Nelson, watchman.

Q. How long did it take you to fill the tanks?

A. We filled the tanks with water all night and finished in the morning about 7, or a little after.

Q. What day would that be? [73]

A. On the 8th.

Q. On the 8th? A. Yes, sir.

Q. Now, when did you take on coal?

A. We commenced the same day, or the day after,—on the 9th, I guess it was.

Q. Is there anything said in the log about it?

A. That is so long ago I don't remember those things. We were working coal—that was Sunday.

Q. Just a minute, now. The 8th is what day of the week? The 12th was Sunday, the 11th was Saturday? A. It was Wednesday.

Q. Well, apart from your log, how long did it take you to take on the coal?

A. We commenced on the 11th, taking on coal.

Q. On the 11th? A. Yes.

Q. And how long did it take you?

A. We didn't finish. We worked a day and a half, I guess, and went to California City then. We worked coal in the morning. It took up to ten A. M.

(Testimony of Martin Swanson.)

Q. Do you know where the "Hawk" was when she was looking for whales?

A. No, I don't. She was out around the Farallones, or Point Reyes, on the old whaling grounds; that is where they usually go.

Q. Did she go down to San Clemente Islands?

A. Not at that time when we were laying in California City.

The COMMISSIONER.—What kind of a boat was the "Hawk"? What was she?

Mr. SAWYER.—She is a killer tug.

The COMMISSIONER.—Q. She is still in active service, is she?

A. Yes, sir. [74]

Q. By the way, Captain, how many killer tugs are there that operate with the "Lansing"?

A. At the present time?

Q. Yes. A. Three.

Q. How many did you have operated down in San Clemente? A. Four.

Q. That is, on that first voyage down to San Cemente when you arrived there in December of 1926? A. Yes, sir.

The COMMISSIONER.—Q. How long was it before you got your first whale after you went out?

A. Out at San Clemente?

Q. After you left port here?

A. Well, it takes about six days to go to San Clemente, and we got one or two the following day.

Mr. SAWYER.—We will have a complete tabulation of all the whales, names and numbers.

(Testimony of Martin Swanson.)

The COMMISSIONER.—That is all right. I was just curious, that is all.

Mr. SAWYER.—We will have that.

(Discussion off record.)

Mr. SAWYER.—Q. Captain Swanson, I understand from Mr. Kent that Mr. Christie, the superintendent of the Santa Fe is going to testify to a conversation that he had with you or with Mr. Klein, or with both of you. Do you know who Mr. Christie is?

A. No. I have heard of him; but I guess I met him.

Q. Do you see him in the room here anywhere? Would you know him if you saw him?

A. No, I would not.

The COMMISSIONER.—Is Mr. Christie here?

Mr. SAWYER.—Yes.

The COMMISSIONER.—Let him stand up. (Person stands up in room.) [75]

The COMMISSIONER.—Q. Do you know that gentleman? (Indicating person standing up.)

A. I remember meeting the gentlemen, but I don't recall him.

Q. You don't remember him? A. No.

Mr. SAWYER.—Q. At any rate, I understand Mr. Christie will testify that it was learned from you or from Mr. Klein, or both of you, that at an inspection made on November 16th, that is, the survey I suppose—that is what they refer to—it was learned that the sailing date of the "Lansing" had been set for Saturday, November 20, 1926.

(Testimony of Martin Swanson.)

Now, do you recall telling anybody, Mr. Christie, or anybody else, that the sailing date of the "Lansing" had been set previous to the collision for Saturday, November 20, 1926?

A. No, I do not recall it exactly; but I may have said we were scheduled to leave the dock to go into the stream, or words to that effect, on Saturday the 20th; but I don't recall it, and I don't recall who I said it to.

Q. Assuming that you did say you were scheduled to leave the dock to go into the stream on Saturday, November 20, 1926, what relation has going into the stream got to going to sea? What do you mean by going into the stream?

A. Going out to anchor away from the dock to finish up.

Q. Did you say you were going to sea on November 20th?

A. I couldn't have said that for the reason that I knew we couldn't get to sea right from the dock. We had to take on coal and the crew had to put the coal aboard.

The COMMISSIONER.—Q. Did you know at that time, Captain, that you were going to have this test, that you were going to try out your machinery? That you were going to California City and were going to lay there while the "Hawk" [76] went out and attempted to catch a whale?

A. I had orders from Captain Dedrick that he intended to send us to California City and work up a whale, to try the new machinery out.

(Testimony of Martin Swanson.)

Mr. SAWYER.—Now, Mr. Christie is also going to testify that while discussing the general situation with Captain Swanson the first information he received as to the expected sailing date was again confirmed; the captain appearing to believe that the repairs on account of the damage would not detain the vessel. In fact, he, the captain, Captain Swanson, expressed a thought that the exact time of sailing was not expected to be before Sunday morning, November 21st, 1926. Did you ever express to Mr. Christie, or anybody else, or anyone, or make a statement that the time occupied in the repairs would not detain this vessel?

A. I do not recall anything of the kind and it was certainly impossible for me to say—

The COMMISSIONER.—Q. Well, do you remember what you did say?

A. No, I don't.

Q. Do you remember any such conversation at all?

A. I was talking to so many people that came down there. I don't remember saying anything of that kind, though.

Q. Was there any arrangement in reference to your sailing at all? A. No.

Q. Had there been any arrangement in reference to your sailing that you know of? A. No, sir.

Q. How did you happen to say, then, that you were going to leave the dock, you thought, on the 20th of November?

A. Previous to the accident, the captain, Captain

(Testimony of Martin Swanson.)

Dedrick, said we would probably be ready to go out in the stream by [77] Saturday.

Mr. SAWYER.—Q. Out in the stream?

A. Yes.

Recross-examination.

Mr. KENT.—Q. You stated that you took on water at the Santa Fe Pier?

A. Yes, sir.

Q. How much water did you take on; do you know?

A. We filled up everything, forward Number 2 tanks, and probably all over the ship*ped,*—everything was filled up.

Q. By "everything," can you give us an idea of what that means? A. All the tanks.

Q. Well, what is the full capacity of your tanks? Do you know? A. I could not say.

Q. Or do you know how much water you took on?

A. We had over 3,000 ton aboard, I should judge.

Q. But you don't know, actually, how much water you did take on?

A. No, I don't know actually how much water we took on board.

Q. Had you taken on any water previous to going over to that 6-inch main at the Santa Fe pier?

A. We took water after, fresh water.

Q. Where? A. Over at Pier 46.

Q. And do you know how much you took on?

A. No, I don't.

Q. What type of water connection was there?

(Testimony of Martin Swanson.)

A. A two-inch hose. It was slow.

Q. You say it was slow? A. Yes.

Q. Were you on the end of the line?

A. There was only a two-inch hose connection over there.

Q. I say, was the connection made by your vessel to the two-inch [78] line on the end of the line or close to the street?

A. At the end of the line.

Q. And you say it was slow? A. Yes.

Q. What do you mean by that?

A. It was a small hose,—a two-inch hose.

Q. And you don't know how much you took from that two-inch hose? A. No, I couldn't say.

(Witness excused.)

TESTIMONY OF THEODORE E. KLEIN, FOR LIBELANT.

THEODORE E. KLEIN was thereupon called as a witness by the libelant, and having been duly sworn, testified as follows:

Direct Examination.

Mr. SAWYER.—Q. State your name and address, Mr. Klein?

A. Theodore E. Klein, 191 Moss Avenue, Oakland.

Q. What is your business, Mr. Klein?

A. Engineer for the California Sea Products Company.

(Testimony of Theodore E. Klein.)

Q. How long have you been such engineer for them?

A. Nine years.

Q. What business were you in before that?

A. I had various places as engineer and machinist and mechanic. I was going to sea before.

Q. Are you a licensed officer?

A. No, I am not.

Q. But you are an engineer? A. Yes, sir.

Q. Have you had any technical training of any kind, or have you served your apprenticeship as an engineer or machinist? A. In Germany.

Q. It was, doubtless, technical training, then. Then you [79] served your apprenticeship as a machinist, did you? A. Yes.

Q. Did you go to any technical schools?

A. Yes.

Q. What?

A. Machinist's school and engineering school in Germany.

Q. Whereabouts was that? A. Hamburg.

Q. How long were you there?

A. One time six months; another time one year.

Q. Did you obtain any degrees or anything of that kind? A. Yes.

Q. What degrees do you hold?

A. Second engineer's license.

Q. What connection did you have with the conversion of the steamer "Lansing" from a tanker to a whaling reduction plant?

A. I had charge of the installation of the ma-

(Testimony of Theodore E. Klein.)

chinery, the whole of the whaling equipment; the installation of the whole of the whaling equipment on the "Lansing."

Q. Representing the owners,—the owners of the "Lansing," of course, the California Sea Products Company? A. Yes.

Q. Do you know what the plans were with regard to the reconstruction of the "Lansing" and what they intended to do with her if there had been no collision; what the plans were before the collision?

A. We intended to go to sea as soon as the forward tanks were finished. At that time we were working on the tanks to tighten up the bulkheads.

Q. At the time of the collision?

A. At the time of the collision. The other equipment was ready to run and we were only working on the tanks to have these bulkheads tight.

Q. How long had you been working on the bulkheads tightening [80] up the tanks and testing them, prior to the collision?

A. About two weeks, if I remember right.

Q. Why did it take so long?

A. Well, it is an old ship and the construction of the bulkheads requires testing; you have to test the bulkheads to make them tight. You tighten up the bulkhead and then you have to test it. If you find any leaks you naturally have to let the water out of it and tighten it up again.

Q. Isn't it possible, or wasn't it possible to locate all of your leaks on one test?

A. Not very well, the way these bulkheads are constructed.

(Testimony of Theodore E. Klein.)

Q. Why not?

A. Well, by testing the bulkheads, you find one leak in one place and another one in another place, then you tighten up these leaks, rivet the seams, or whatever it is; but a seam is liable to open up further up or down in another place. Therefore, if you tighten up one place it is very likely, or it is possible that another place opens up; then you fill up the tank and test it again and naturally if you fail to discover that new leak you have to let all the water out again and then you have to tighten that new leak again.

Q. Now, why couldn't the work all have been done at the same time? I mean, why couldn't the work of tightening up and testing these bulkheads have been carried on during the time the collision repairs were being made?

A. Well, when we were testing and tightening up the bulkheads, always we had to fill the tank with water. We had as much as two thousand tons of water in there at times when we tested the bulkheads. We had to test the bulkheads [81] from both sides. That naturally would lower the ship in the water and it would submerge the opening on the side of the ship which was caused thru that collision. The plates were taken off there, and if we had filled the forward tanks the ship would have been lowered in the water and it would have filled up the boiler-room and engine-room with water and cause the ship to sink, naturally.

Q. Now, do you remember how long this work of

(Testimony of Theodore E. Klein.)

testing and tightening the tanks continued after the collision repairs were completed?

A. Well, if I remember right, it was ten days or so. I couldn't say for exactly, but it is approximately ten days that it took afterwards, and we worked nights, at that.

Q. You did work nights?

A. Yes, we did; sometimes we worked the whole night.

Q. And, as I understand you to say, none of that work could have been carried on at the same time the collision repairs were going on?

A. It could not.

Q. When did you leave the "Lansing"? When that work was completed?

A. I did not leave the "Lansing." I stayed with the "Lansing."

Q. All the time? A. All the time.

Q. Do you remember what the "Lansing" did from the time the work on the tanks were completed?

A. After the tanks were tested and after the work on the bulkheads was completed, and we could fill the tanks with water, we filled the tanks with water and got ready to go.

Q. Just a minute. You say you filled the tanks with water. [82] Do you remember what day that was, Mr. Klein,—assuming that the work on the tanks was completed on December 8th? Do you know when the work of filling the tanks,—getting your fresh water,—started? A. Yes.

(Testimony of Theodore E. Klein.)

Q. When did that start?

A. At 5 o'clock in the evening.

Q. On the day the tanks were completed?

A. No. The same day so soon as we had the tanks completed the tugs came alongside and we pulled right over to the Santa Fe docks and we started filling the tanks at 5 o'clock in the evening.

Q. Did you take any water on at Pier 46?

A. Some, yes.

Q. Why didn't you take all of it on there?

A. Because it would take too long; I think it would take about ten to twelve days to fill the tanks with water there, because we would have to take so much water there. We carry about 4,000 tons of water.

Q. You do? A. Yes.

Q. And you had to take that much water on board? A. Yes.

Q. So you left Pier 46? A. Yes, sir.

Q. Then where did you go?

A. Over to the Santa Fe dock.

Q. That is right across the stream?

A. Right across the stream.

Q. What did you do at the Santa Fe dock?

A. There is a six-inch hydrant there and we connected our hose to that hydrant and filled the ship full of water,—whatever fresh water we wanted to take.

Q. And when did you finish that?

A. It was approximately 7:30 in the morning,—7:30 or 8 o'clock. [83]

(Testimony of Theodore E. Klein.)

Q. What day was that?

A. That was the next day; that would be the 9th, or the 8th.

Q. That would be on the 8th. Now, did you take on any fuel oil?

A. The fuel oil we took on after we left the dock and went out in the stream.

Q. After you left what dock,—the Santa Fe dock or Pier 46? A. Santa Fe dock.

Q. I am trying to get this chronologically, Mr. Klein. You did take on fuel oil right after you got thru taking on your water at the Santa Fe dock?

A. After we took the water we went out in the stream and the next morning—

Q. That would be the ninth? A. The ninth.

Q. The ninth.

A. The oil barge was alongside pumping oil in the ship.

Q. And how long did that take?

A. That took, if I remember right, three hours, or three to four hours.

Q. What did you do after you got your fuel oil on board?

A. After we got the fuel oil on board, at the same time we took some coal on board.

Q. Simultaneously with the taking of the fuel oil on board? A. At the same time.

Q. You were taking on coal on one side and oil on the other; is that it? A. Yes, sir.

Q. And how long did it take to get the coal on board?

(Testimony of Theodore E. Klein.)

A. It took—some of the coal—well, it was very slow. So far, most of the sacks were rotten and the men had to sack the coal, and we sacked the coal on the barge and took it over on the ship, and it was a slow process, and so we took some of the coal and then the barge was sent back to the [84] coal company to resack the coal so that we could handle it better.

Q. Then after the barge was sent back,—what day was that?

A. That was on the 9th, I think it was.

Q. On the 9th. Now, did you do any taking on of coal or supplies or anything of that kind on the 10th?

A. Supplies. We got some supplies, but we took some supplies on at Pier 46,—whatever we could handle. We were in a hurry to get away. Some of it was not delivered in time and that was delivered out in the stream.

Q. Well, was any coal delivered on the 10th?

A. The 10th,—coal?

Q. Yes.

A. Even coal was specially delivered. It would be blacksmith coal.

Q. You say the barge was sent back?

A. Yes, the barge was sent back.

Q. Now, when did they return?

A. They did not return until we came back from California City.

Q. I see. Now, when did you go to California City; do you remember what day of the week it

(Testimony of Theodore E. Klein.)

was, or how soon it was after you had taken on your supplies out in the stream?

A. Well, so soon as we had all the supplies; I couldn't say exactly the date; it must have been the 10th, I suppose—10th or 11th—that we went to California City.

Q. What day was it? The log says the 12th.

A. Or the 12th. It may be. I couldn't just fix the exact date.

Q. Well, were the operations on the "Lansing" conducted in a leisurely fashion, or in a ship-shape fashion; or were they [85] trying to get to sea or were they trying to dilly-dally along?

Mr. KENT.—Just a minute. I don't think that question is proper. The Court determines how the work was being carried on.

Mr. SAWYER.—Q. Well, was any time lost that you know of, anywhere?

A. I could not say that any time was lost, because we were rushing to get these tanks ready at that time; and as soon as these tanks were ready we were supposed to go out in the stream; and it was figured to try it out, try out the machinery in California City or some other likely place right in the Bay, that we can try out the equipment to render a whale.

Q. What I am trying to get at is this: Up to the time the work on the tanks was completed and you began to take on water, from that time until you left for California City, was there any time lost?

A. None, whatsoever. We loaded the water in a

(Testimony of Theodore E. Klein.)

quicker time, and the next day when we got out in the stream we took on fuel oil; and the coal we left behind in order to try the equipment, we left that, because at the time we did not need the coal. We went over to California City and we were going to try out the machinery there so as to get to the whaling grounds so soon as possible.

Q. And then when you came back from California City did you take on coal?

A. Yes. We took on the rest of the coal.

Q. In other words, they were preparing the coal while you were at California City?

A. While we were at California [86] City.

Q. Now, with the exception of the time you were at California City waiting for the "Hawk" to bring in a whale so you could test your equipment, was any time lost from December 8th until you went to California City?

Mr. KENT.—That is, if he knows.

Mr. SAWYER.—He was right there.

Mr. KENT.—He couldn't tell what went on all over the ship, no.

A. Not so far as all over the ship, but so far as the equipment was concerned, I know that. I had full charge of the equipment.

Mr. SAWYER.—Q. Did you have charge of the stores and supplies?

A. Not the stores and supplies; only whatever was pertaining to the whaling itself. I had charge of that.

Q. Mr. Klein, it is likely that Mr. Christie,—do

(Testimony of Theodore E. Klein.)

you know Mr. Christie,—superintendent of the Santa Fe? A. I know him.

Q. You recognize him, do you, in the room here?

A. Yes.

Q. It is likely that Mr. Christie will testify somewhat to this effect: That his first information in connection with the accident and the damage and possible sailing date of the "Lansing" was obtained on November 16th when one of the Santa Fe officials made a detailed inspection in company with a Mr. Klein, "who I believe represented the California Sea Products Company." Now, Mr. Christie will go on and say at that inspection it was learned the sailing date had been set for Saturday, November 20, 1926. Did you ever— [87]

Mr. KENT.—Pardon me; what date?

Mr. SAWYER.—November 20, 1926.

Q. Did you ever tell Mr. Christie, or anyone else, anything to that effect?

A. It may be that I say tentatively the sailing day is set for that, but I could not say for sure. And so far as I explained, on account of the nature of the repairs of the tanks, you could not set an exact date ahead. It is possible I may have said that we figured to go away from there on the 20th.

Q. To go from where?

A. To leave the Pier 46.

Q. To go where? A. Out in the stream.

Q. Out in the stream? A. Yes.

Q. If the "Lansing" had gone out into the stream would she then have been ready for sea?

(Testimony of Theodore E. Klein.)

A. Well, she would not be ready for sea. She could only be ready for sea when we had the fuel oil and provisions on board; and that is what we had to take in the stream,—the fuel oil and coal and supplies.

Q. What did you mean by "sailing on November 20th"?

Mr. KENT.—Just a minute. I will object to that, just to what the meaning of the statement was, because the statement goes for what it is worth. I don't think it is proper to get the inner workings of a man's mind. The statement is what we are interested in.

Commissioner KRULL.—I think I have got it clear, what he intended. He said he was going to leave that dock on the 20th. What has happened since that has been testified to, that the vessel was out in the stream; that the work of testing the tanks was completed and that the vessel then went [88] to California City to wait for the "Hawk" to bring in a whale so that they could test their machinery.

Mr. SAWYER.—Q. Did you ever tell Mr. Christie, or anyone else, that, in your opinion, the repairs on account of the collision damage would not detain the vessel?

A. No. I never said anything like that.

Q. Did you ever entertain such an opinion?

A. No.

Q. Did you have anything to do with the fixing of the sailing time of the vessel?

(Testimony of Theodore E. Klein.)

A. No. I have absolutely nothing to do with that. Even if I said anything like that, I expressed my private opinion regarding the sailing date. It would have nothing to do with the official time.

The COMMISSIONER.—Q. Had you been informed what the approximate sailing time was?

A. No.

Q. Did you know the vessel was going over to California City and wait there until the "Hawk" brought in a whale so you could test out your machinery?

A. Yes. It was only so far as—what detained us was the repairing of the tanks.

Q. I will ask you this question. Did you say you knew the vessel was going to California City?

A. Yes. We figured first—Captain Dedrick figured to go there to California City, or Drakes Bay.

Cross-examination.

Mr. KENT.—Q. Mr. Klein, I wish you would go a little bit more into the detail of your experience in the engineering business. Where did you get your training? [89]

A. In Germany.

Q. On what type of work? A. As machinist.

Q. In a shop?

A. In a shop. I served four years apprenticeship.

Q. What type of work were you engaged in there?

(Testimony of Theodore E. Klein.)

A. Machines; building machines and repairing machinery.

Q. What kind of machinery?

A. Steam engines.

Q. Steam engines?

A. And motors; general repair work and running machinery.

Q. Then after that you went to sea?

A. Yes, sir.

Q. On what type of vessel did you go to sea?

A. Steam vessel.

Q. What was your work on those vessels?

A. I started in as an oiler, fireman, and afterwards I attended school and got my engineer's license. Then I was an engineer.

Q. That is, you were licensed as a marine engineer?

A. Licensed as a marine engineer on German vessels.

Q. What class of license did you get?

A. There is only one class of license; that is the engineer's license.

Q. What vessels did you work on in the United States?

A. Here in the United States I didn't work on any vessels.

Q. You were not connected with marine work while you were here?

A. Yes; I was on a German vessel.

Q. Oh, German vessel. I see. Did your work consist of or have anything to do with tanks?

(Testimony of Theodore E. Klein.)

A. Tanks, yes, sir; because I worked for four years on a tank steamer.

Q. And then you went to work for the California Sea Products Company? A. Yes. [90]

Q. And were you on any vessel but the "Lansing" there? A. Only the "Lansing."

Q. Have you ever been in charge of or have you ever conducted any work in repairing tanks, extensively,—yourself? A. No.

Mr. KENT.—That is all.

(Witness excused.)

TESTIMONY OF WILLIAM JOSEPH BIGGINS, FOR LIBELANT (RECALLED).

WILLIAM JOSEPH BIGGINS was thereupon called as a witness by the libelant, and having been previously sworn, testified as follows:

Direct Examination.

Mr. SAWYER.—Q. Mr. Biggins, I ask you to produce your time sheets for all the work done on the "Lansing." Have you got those with you here?

A. Yes.

Q. Now, just tell the story from your own time sheets. Tell us what was done,—the times when it was done, and all the rest of it from the time you started in until you got thru.

A. Well, we started on the "Lansing" in September with a few men. That was September 16th.

Q. Whereabouts?

A. When she was at the Bethlehem shipyards.

(Testimony of William Joseph Biggins.)

Then there was nothing doing until September 27th. Now, we had a few men over from September 27th to October 2d.

Mr. KENT.—It occurs to me that as the testimony here is to the effect that everything was completed except the testing of the tanks and bulkheads, it would hardly be necessary to go into all the details of this work. [91]

The COMMISSIONER.—No. Get right down to the point, right down to the time of the collision.

Mr. SAWYER.—Q. Begin, then, from the time you began to work on her at Pier 46. When was that? She was transferred over from the Bethlehem Shipyards over to Pier 46,—was she not?

A. Yes.

Q. Why?

A. Well, we built the digesters and blubber pots, as you know, and they brought her down to Pier 46 to install the blubber pots and fit her up for sea. I don't know what date she came to Pier 46, unless it was somewhere around November 8th. Wasn't it about that time, Captain Dedrick?

Mr. DEDRICK.—I think it was something like that.

The COMMISSIONER.—The witness will testify as to his own knowledge.

Mr. SAWYER.—Q. Mr. Biggins, tell us what you were doing on the "Lansing," say, for the three or four days or two weeks prior to November 16, 1926?

A. We installed all the digesters and connected them up and, well, in fact, everything on the vessel we were doing—connecting up the engine that ran

(Testimony of William Joseph Biggins.)

the conveyers, or, something like that; and I think about November 16th or the 15th—I can say by the sheet here—on about November 15th we started to lay off men.

Q. About November 15th? A. Yes.

Q. Now, what remained to be done from November 15th on?

A. Testing Number 1, 2 and Number 3 tanks.

Q. And how about the tanks on the after part of the ship? A. They were completed.

Q. And were entirely satisfactory, were they,—tight? [92] A. Tight, yes.

Q. You found no more leaks? A. No.

Q. In the after tanks? A. No.

Q. And you still had the forward tanks to test and tighten up? A. Yes.

Q. Now, at what hour were the repairs, the collision repairs, due to the collision between the tug and the steamer, completed? Your concern made those repairs, too, didn't they?

A. Yes, sir.

Q. What hour were those completed, if you know?

A. We submitted a price for the repairs on that job, as you know?

Q. Yes.

A. And we started, if I am not mistaken, on the afternoon of the 16th or the 17th. I wouldn't say for sure whether it was the 16th or 17th, but I think it was the 16th or 17th and we gave them a letter stating that we would finish the repairs in 7 days. And there was some gentleman from the

(Testimony of William Joseph Biggins.)

Santa Fe that came up to our shop. I was talking to him. I think it was this gentleman here.

Q. Who did you identify,—Mr. Christie?

The COMMISSIONER.—What is your name?

Mr. RULING.—Mr. Ruling.

Mr. SAWYER.—The witness identifies Mr. Ruling. And continue.

A. I forget just how it came about, but it was thru the Santa Fe that we worked overtime to get the ship finished sooner, and they said they would pay the overtime for the completion of the job; whatever overtime we worked to get the job out sooner, they would take care of the overtime to us.

Q. Now, according to your records, if your records show it, [93] when were the collision repairs completed on the "Lansing"?

A. I think it was either Monday morning, that is, on the 22d; or the morning or afternoon. I wouldn't say which.

Mr. KENT.—I think we stated the work was completed at 5 P. M. on the 22d.

The WITNESS.—I think that is what it was.

Mr. SAWYER.—We will stipulate it was, anyhow.

The WITNESS.—That is right.

Mr. SAWYER.—Q. Now, from 5 P. M. on the 22d, how long was it until you finished your work for the "Lansing"?

A. I think it was the 4th of December, or the 2d of December; I wouldn't swear now.

Q. Well, don't your records show, Mr. Biggins?

A. I have got here—I remember—Well, we

(Testimony of William Joseph Biggins.)

worked all night on the 2d of December, on the tanks, on the bulkheads of the tanks. When I see here a fellow named Carr and a fellow named Cannon. They worked on December 4th, and whether that was at the dock or out in the stream, I don't just recall.

Q. What are the sheets you have here, Mr. Biggins?

A. (Witness hands Mr. Sawyer the sheets referred to.) Here.

Q. What is the theory of these sheets? For example, here is December 7th, with "3." What does that mean?

A. That was in the shop; the tools that have been checked back after they had taken them back from the job. Henry, the tool clerk, checked the tools off.

Q. And when was the last work done on the "Lansing"?

A. The last work on the outside was done on the "Lansing" on December 4th.

Q. Could any of the work that was done by your concern from [94] November 22d until December 4th,—could any of that work been done simultaneously while the collision repairs were being made to the "Lansing"? A. No, sir.

Q. Why not?

A. Well, I will tell you. Where she got the bump on the port side, it is about 18 inches, I should judge, above the water, and if I am not mistaken we burned the rivets out of that plate. We started in, I think—the bid was opened up at 3 o'clock in the afternoon, and I had a few fellows down there

(Testimony of William Joseph Biggins.)

working that night for a little while burning out rivets, and the next day I think that we were ready to take off one plate and we wouldn't take it off, if I recollect, until the following morning because we did not want to leave the ship open overnight and the rivets that we had burned out, we had driven wooden plugs in there to keep the wash of the water from going into the fireroom.

The COMMISSIONER.—In a sense, this is merely cumulative.

Mr. SAWYER.—He is not taking up too much time, is he, Mr. Commissioner?

The COMMISSIONER.—No; but I think the testimony he is now giving is merely cumulative.

Mr. SAWYER.—Very well.

Q. After the work on the outside of the ship was completed by your men, was anything done about testing the tanks?

A. Yes. Then we started again on the tanks. We were working on the tanks at the time of the collision, and then after the collision, of course, we didn't do anything or couldn't do anything with the tanks until the repairs were made on account of the collision, and after the repairs were made on [95] the collision damage, then we started back to work again on the tanks, testing them, and making repairs, checking the leaks in the bulkheads.

Q. Yes. And I think you said that the last work was done on December 4th?

A. The last work was done on November 4th. That may have been something on the boiler. I don't know. I can't recall just what it was.

(Testimony of William Joseph Biggins.)

Q. Was any testing done after that date?

A. I think the last testing was done on December 2d, if I recollect right. If I recollect right it was the welder that was there all night.

Q. Mr. Biggins, have you any more records than you have produced here? Have you got the original time sheets of the men?

A. This is the original time sheet right here. The only other record that I know of is the repairs on account of the collision; and we started that on 16th and we finished that on the 22d.

Cross-examination.

Mr. KENT.—Q. Mr. Biggins, you stated that you did some on the "Lansing" after the 22d, after the Santa Fe collision repairs were completed?

A. Yes.

Q. Just what, in detail, was that work?

A. That was testing the tanks and making them tight.

Q. Then you were engaged in no other work than this tank work after the 22d? A. Yes.

Q. That is clear, is it? A. Yes.

Q. What tanks did you test?

A. It is Numbers 1, 2 and 3. [96]

Q. And they are located where? A. Forward.

Q. And just state what you did. By the way, how many men did you have working on this job of testing tanks? You might start from the beginning, if you can give it briefly, and tell us each day how many men you had working?

A. Yes. There was 11 men on the 23d.

Q. How about the 24th?

(Testimony of William Joseph Biggins.)

A. 11 on the 24th. There was three on the 25th.

Mr. KENT.—Yes.

The COMMISSIONER.—That is November?

A. Yes; November. There was 8 on the 26th; 8 on the 27th; you see, we were testing the tanks. I don't know just exactly how long it takes to fill one of these tanks, but you fill them up and you discover a leak and then they pump them out again, then we try to locate the leaks, putty-pumping the bars and electric weld the bind bars.

Q. All right. You have gotten to the 27th.

A. 27th, yes. On the 28th we got 14 men working part night.

Q. Just let me interject a question there. Before the 28th there had been no night work on the tanks, was there? A. Yes, there was on the 25th.

Q. What night work had there been between the 22d and the 28th? A. That is all,—until the 25th.

Q. None until the 25th?

A. None until the 25th.

Q. And on the 25th how many men worked overtime? A. Two men.

Q. Worked how long?

A. Eight hours overtime?

Q. And there was no more night work until the 28th? [97]

A. No more night work until the 28th.

Q. And how long did they work overtime on the 28th? A. Eight hours overtime on the 28th.

Q. How many men?

A. Eleven men worked 8 hours overtime; three men worked straight time.

(Testimony of William Joseph Biggins.)

Q. Now, go ahead with the remaining days, segregating the straight time and the overtime?

A. 29th,—8 men overtime.

Q. That is, all the 8 men worked overtime, did they? A. Yes.

Q. And they worked 8 hours straight time?

A. Eight hours straight time, yes.

Q. All right; the next day?

A. Six men worked a half day straight time.

Q. And on the 30th?

A. No; the 29th. That is the 29th. On the 30th there were ten men working straight time. On the first there were ten men straight time. On the second there were three men straight time and there were two men worked all night.

Q. The record doesn't show what these fellows were doing, does it? A. They were on the tanks.

Q. It doesn't show exactly what tank?

A. No, it doesn't show what they were doing.

Mr. SAWYER.—Q. Well, do you know what they were doing?

A. Yes; that is the only thing we were working on at the time,—the tanks.

Q. Go ahead.

A. On the 3d, one man straight time, three men all night; one man to 8 o'clock and one man to 12 o'clock.

Q. These hours are both in the evening from 8 to 12 P. M.? [98] A. Yes, P. M.

Q. Go ahead.

A. On the 4th there were two men all night.

(Testimony of William Joseph Biggins.)

Mr. KENT.—Q. That was the last day you worked on the tanks. The 4th was the last day you worked on the tanks?

A. Yes.

Q. Have you completed your statement for that?

A. As much as I know.

Q. Let me ask you, was this work that you did on the tanks on a contract or on a per diem?

A. It was time and material.

Q. Time and material? A. Yes.

Q. You charged a certain amount for the work done and that is all there was to it?

A. That is it.

Q. That overtime which you refer to, that was actual time after the 8 hours straight time; is that correct? A. No. Well, all night.

Q. In other words, when you stated the men worked 8 hours overtime, you mean a man worked 8 hours straight time and 8 hours overtime?

A. No; 8 hours straight time and 4 hours overtime. Four hours overtime is equal to 8 hours straight time.

Q. Then, when you testified a man worked, say, 8 hours overtime, you mean he was paid for 8 hours time, but he only actually worked 4 hours after the first 8 hours? A. That is it.

Q. Were you in charge of the work, yourself?

A. Well, I was on the ship, back and forth.

Q. Do you know how the testing was carried out?

A. Yes. [99]

Q. Will you just explain in detail what was done, please?

(Testimony of William Joseph Biggins.)

A. Well, on the bulkheads,—whenever they start to test a bulkhead, they fill the tank up with water as far up as they can go. I remember a couple of occasions that they had six feet of water in the tank and then they had to pump it out because we discovered a leak about that high above the bottom of the tank and then we had to pump that tank out; then we stopped that leak and then we go ahead and pump her up again, that is, fill her up again, and as they went up they would mark the leaks as we would spot them. Unless the leak was too big, we would mark them, and then empty the tank again, and then fill her up again and make another test, and keep on doing that until we get the tank tight. If I am not mistaken they would fill, like, say, Number 1 tank, and we would go on the other side into the forward part of Number 1 tank and go to the forward bulkhead and try to discover leaks. Well, the bound bar would be on the after side of that tank and that tank would have to be emptied again so we could go back into the other tank and calk the bound bar on that side.

Q. Would you fill the tanks in pairs, or just one at a time?

A. Well, naturally we had to fill one at a time.

Q. Then if you failed, after you had done as you described,—if you failed to find the leak, then you would have to fill the tank again, check the leaks and then empty them,—I mean, fill them again; look for more leaks and so on? A. Yes.

(Testimony of William Joseph Biggins.)

Redirect Examination.

Mr. SAWYER.—Q. Mr. Biggins, I want to get this straight. What do you mean by 8 hours overtime? You read that item, [100] for example, 8 hours overtime. What does that mean?

A. Well, when you work overtime they get two for one,—anything after 5 o'clock is double time.

Q. All right.

The COMMISSIONER.—Q. They allow you two hours for one?

A. Two for one.

Mr. SAWYER.—Q. When a man gets overtime 8 hours he is being paid for actually four hours' work?

A. Four hours.

Q. Four hours straight time, but he has worked 8 hours, or has he worked four hours.

A. He worked 4 hours and got paid for 8 hours.

Q. That is what I mean.

A. Eight hours overtime, yes.

Q. Now, you stated during your testimony in answer to a question by Mr. Kent that they would fill the tanks. Who did you mean by "they"?

A. Well, Mr. Klein and the engineer.

Q. Well, who filled the tanks,—the Eureka Boiler Works or the "Lansing"?

A. The crew of the "Lansing."

Q. How long did it take to fill the tank?

A. Well, that I wouldn't state.

Q. Well, you were there, weren't you?

(Testimony of William Joseph Biggins.)

A. Well, I was there; I was not there part of the time, but off and on,—I would say, half a day.

Q. Well, could your men do anything while the "Lansing" crew were filling the tanks? Could they do anything on that tank?

A. Well, at times we could and other times we couldn't. That is why you see some men were laid off while they were filling the tanks.

Q. That is all I wanted to know, why they were off. [101]

Mr. KENT.—Nothing further.

(Witness excused.)

TESTIMONY OF EDWARD NELSON, FOR LIBELANT.

EDWARD NELSON was thereupon called as a witness by the libelant, and having been duly sworn, testified as follows:

Direct Examination.

Mr. SAWYER.—Q. Mr. Nelson, will you state your name and address for the record?

A. Edward Nelson, 641 Clayton Street, San Francisco.

Q. What is your business, Mr. Nelson?

A. Retired shipmaster. I have been a shipmaster, but quit going to sea.

Q. How long did you go to sea?

A. Well, I went to sea some fifty odd years.

Q. Did you hold any licenses?

A. Yes; I hold a shipmaster's license,—sailing.

(Testimony of Edward Nelson.)

Q. Sailing? A. Yes.

Q. Unlimited; any ocean? A. Yes; any ocean.

Q. What was your position on the "Lansing" at the time of the collision here in question?

A. Night watchman.

Q. Did you see the damage done by the collision?

A. Yes; I saw the collision and I saw the damage.

Q. Where was it?

A. It is on the port side just between the engine-room and the boiler-room.

Q. How far above the water-line as the ship was then laying in the water?

A. I should judge about 18 inches to two feet. [102]

Q. Do you know what work was being done on the tanks at the time of the collision?

A. Yes. I am not a machinist, but I know they were working on them all the time, trying to get them tight.

Q. What were they doing?

A. Sometimes after welding up one leak and filling it with water they found another one and would have to pump the water out and go at it the same way again.

Q. Did they do any work of that kind while the collision repairs were being made? A. No.

Q. Why not? A. Couldn't do it.

Q. Why not?

A. Because the vessel was too deep in the water

(Testimony of William Joseph Biggins.)

and she would have filled up with water thru the hole.

Mr. SAWYER.—That is all.

Mr. KENT.—No questions.

(Witness excused.)

TESTIMONY OF WILLIAM JOSEPH BIGGINS, FOR LIBELANT (RECALLED).

WILLIAM JOSEPH BIGGINS was thereupon recalled as a witness by the libelant, and having been previously sworn, testified as follows:

The COMMISSIONER.—Just state what you have to say; what you have in mind?

Mr. SAWYER.—He wants to correct his testimony.

The WITNESS.—On the 5th of December there was four men worked until 12 o'clock that night.

Mr. KENT.—Q. From when?

A. From 8 o'clock in the morning. On the 6th there were three men working a straight [103] day; one man worked until 8 o'clock; two men worked until 12 o'clock and two welders worked until 2 o'clock A. M. the next morning.

Mr. SAWYER.—Q. All this being measured by a day commencing at 8 o'clock A. M.?

A. 8 o'clock A. M. And on the 7th there was 5 men working a straight day. On the 8th, there was 5 men working half a day.

Mr. KENT.—And that is all those men were doing,—working on the tanks?

(Testimony of Martin Swanson.)

A. That is all they were doing.

(Witness excused.)

Mr. KENT.—I would like to have the log introduced in evidence.

The COMMISSIONER.—Let the log be introduced in evidence. Let us proceed, Gentlemen.

Mr. KENT.—We would like to have the log introduced in evidence for whatever it is worth.

The COMMISSIONER.—Very well, proceed.

TESTIMONY OF MARTIN SWANSON, FOR LIBELANT (RECALLED).

MARTIN SWANSON was thereupon recalled by the libelant and having been previously duly sworn, testified as follows:

Direct Examination.

Mr. SAWYER.—Q. On November 25th, 1926, at 9:45 o'clock A. M. there was an entry made in the log that the steamer "Erfurt" drifted into our upper bulwarks and broke one stanchion and some planks on the outer works. What was that?

A. That was the German steamer that came by on Sunday morning. [104]

Q. On Sunday morning?

A. Yes. I wasn't on board when that happened.

Mr. DEDRICK.—I was on board when that happened.

Mr. SAWYER.—Oh, you were on board. All right, then, we will have to recall Captain Dedrick regarding that.

(Testimony of Thomas R. Reed.)

The COMMISSIONER.—It is now 4:30, Gentlemen, and I think we had better adjourn without setting a date.

(Whereupon, at 4:30 o'clock P. M. on Thursday, February 23, 1928, the hearing was adjourned without date.)

[Endorsed]: Filed Jul. 15, 1930. [105]

San Francisco, California,
Tuesday, December 11, 1928, 2 P. M.

(The hearing was continued, pursuant to adjournment, before Honorable Francis Krull, Commissioner, the libelant being represented by H. M. Sawyer, Esq., of Messrs. Sawyer & Cluff, and the respondent being represented by Platt Kent, Esq.)

Mr. SAWYER.—As I recall the testimony, it was on the 7th of December, 1926, that the "Lansing" left Pier 46 and went over to the Santa Fe dock to get water, and I propose to take up the weather conditions from then on.

Mr. KENT.—What date was that?

Mr. SAWYER.—Beginning with December 8th, and I will call Mr. Reed.

TESTIMONY OF THOMAS R. REED, FOR LIBELANT.

THOMAS R. REED was thereupon called as a witness for the libelant, and having been duly sworn, testified as follows:

Direct Examination.

Mr. SAWYER.—Q. Will you please state your full name and address?

(Testimony of Thomas R. Reed.)

A. Thomas R. Reed; 1118 Milvia Street, Berkeley.

Q. And what is your business, Mr. Reed?

A. Meteorologist in the Weather Bureau Service.

Q. You are employed by the United States Government? A. Yes, sir.

Q. And how long have you been in that service?

A. About fifteen years.

Q. In what capacity, or capacities have you served with the United States Government?

A. Pretty near all of them, from assistant observer in the assistant observers' ranks, observer, associate or assistant meteorologist, and meteorologist. [106]

Q. Have you served at any other places besides San Francisco? A. Yes, sir.

Q. Where?

A. Reno, Nevada; Portland, Oregon; Washington, D. C.; Walla Walla, Washington.

Q. How long have you been stationed in San Francisco—I judge you are now stationed here in San Francisco?

A. Yes. I came here in 1915 in the Weather Bureau Service.

Q. Who is in charge of the Weather Bureau in San Francisco? A. Major E. H. Bowie.

Q. And what is your present position?

A. Assistant forecaster under him.

Q. The United States Weather Bureau keeps very

(Testimony of Thomas R. Reed.)

careful records of weather conditions from day to day, does it not? A. Yes, sir.

Q. Upon what basis are those records compiled?

A. What basis—

Q. Yes, what is the material which goes into them?

A. You refer to the weather—particularly to the wind?

Q. Yes.

A. Just as far as possible from instrumental observations. Where it is not possible to secure such observation by mechanical means they are made by eye observations, from observers on duty.

Q. Do reports from elsewhere than the weather observer, and the Weather Bureau station on the top of the Merchants Exchange Building form any part of the records? A. Not the local records.

Q. So that the local records are based entirely on the records and observations of the staff located on the Merchants Exchange Building?

A. Yes, sir.

Q. You have with you the records of the Weather Bureau for the [107] year 1926? A. Yes, sir.

Q. Will you turn to the 8th day of December, 1926, and tell us what your records show as to the weather conditions prevailing on that day? Hour by hour, if you can.

A. Do you want all of the weather conditions, or any particular one?

Q. Particularly as to the wind velocity and directions.

(Testimony of Thomas R. Reed.)

A. The wind was north during the entire day, except between eleven in the morning and two in the afternoon, when it was from the northwest. The weather was clear all day, and bright and sunshiny. The wind velocities were high throughout the day.

Q. What were they?

A. The hourly movement, beginning at midnight—

Q. That is midnight beginning with the 8th?

A. Yes.

Q. That is, 12:01 A. M., beginning from that point? A. Yes, sir.

Q. Now, give us the velocities, the entire movement of wind during that period.

A. Of course, the entire movement of the wind during that hour, there might have been a higher velocity. The record is, from twelve to one, ten miles; from one until two, seven miles; two to three, thirteen miles; three to four, ten miles; four to five, eight miles; five to six, twenty-one miles; six to seven, thirty-one miles, with an extreme velocity of forty-four miles during that hour; seven to eight, twenty-two miles; eight to nine, thirty-one miles with an extreme velocity of forty miles; nine to ten, twenty-one miles with an extreme velocity of thirty-seven miles; ten to eleven, thirty-five miles with an extreme velocity of forty-three miles; eleven to twelve, forty-three miles with an extreme [108] velocity of forty-nine miles; twelve to one, forty-six miles with an ex-

(Testimony of Thomas R. Reed.)

treme velocity of fifty miles; one to two, forty-two miles with an extreme velocity of forty-eight miles; two to three, thirty-six miles with an extreme velocity of forty miles; three to four, twenty-nine miles; four to five, thirty-three miles and with an extreme velocity of thirty-six miles; five to six, twenty-six miles; six to seven, twenty-five miles; seven to eight, twenty-six miles; eight to nine, twenty-four miles; nine to ten, twenty-five miles; ten to eleven, twenty-four miles; eleven to twelve, thirty miles.

Q. That covers the entire day? A. Yes.

Q. The twenty-four hour period? A. Yes.

Q. And those velocities were observed from the station on the Merchants Exchange Building?

A. Yes.

Q. Now, what do your records show for the following day, the 9th?

Mr. KENT.—May I interrupt for a moment. Your purpose is to show the weather conditions to a certain period following that day?

Mr. SAWYER.—Yes.

Mr. KENT.—I don't know, probably it will be connected up later.

Mr. SAWYER.—I will tell you what the connection is, so that we will all understand it. The fact is that the steamer went into the stream on the 8th and coal wasn't brought aboard, coal wasn't loaded until the 11th, and the purpose of the testimony is to show the conditions of wind and weather were such that no barges could come alongside of

the ship. Because, if your Honor will recollect, the theory upon which this case is being tried is this: At the time the collision took place the California Sea [109] Products Company was engaged in a definite program of repair, or alteration of this vessel. In connection with this loss of six days which we claim, I want to show that there was no loss of time that was avoidable from the time the repairs were finally completed until we got to sea.

Mr. KENT.—I would like at this time to object to the testimony on the ground that it is entirely immaterial, as to what the weather conditions were on those dates, because, as I understand it, they are not dates for which the delay is charged.

Mr. SAWYER.—Would your Honor like a statement from me? I want your Honor to have a thorough understanding of the theory of this case.

The COMMISSIONER.—Yes.

Mr. SAWYER.—Now, as I recollect the testimony the repairs were completed on the 7th—possibly on the 6th—at any rate on the 7th the steamer for the first time was able to go over to the Santa Fe dock to get water, and this water was absolutely essential for them to get in order to carry out their work, and they got it at the first possible moment. What I am trying to show is that, that from the time the repairs were completed until the time when the vessel was actually on the whaling grounds, the program of the ship was carried out with all possible expedition. That is, no delay in the pro-

gram is attributable to the California Sea Products Company. That being so, and the program being absolutely indispensable before the vessel could go to sea, if that program has been delayed six days by the repairs, then it must follow they would have been completed, and they would have been on the whaling ground six days earlier than they were.

Mr. KENT.—Is there anything in the record to show that the loading of the coal could not take place at the dock? [110]

Mr. SAWYER.—Yes, there is, evidence to show that they couldn't get the ship into the dock on account of the congestion. Second, that they couldn't do anything at that time in the way of loading coal on account of the hole near the bottom, near the water-line, and immediately they began to fill up the ship, to load the ship, this hole near the water-line would be depressed below the water-line and the ship would fill. And if there is no testimony to show at the present time that coal could not have been taken simultaneously with the making of the repairs there will be. We make that offer.

Mr. KENT.—The record shows that the repair of the outside damages were finished on or about November 22d.

Mr. SAWYER.—Part of it may have been, but the testing of the tanks could not be carried on.

The COMMISSIONER.—I think perhaps we had better let Mr. Sawyer go on, subject to your objection, and then later if it is not material it may be stricken out.

(Testimony of Thomas R. Reed.)

Mr. SAWYER.—I want the Court to understand thoroughly the theory upon which we are working. I take it that if during the course of our program the ship lay around three or four days with no excuse that we cannot charge that to the Santa Fe. My theory is, that as to the loss of the six days, that we are entitled to the six days we were delayed in completing our program. If that is true, we were deprived of six days earlier fishing than we did in fact get.

The COMMISSIONER.—Proceed with the evidence.

Mr. SAWYER.—Q. Now, what do your records show as to the next day, the 9th?

A. Another clear day, bright, sunshine. North, northeast, wind prevailed all day.

Q. Now, give us the wind velocities from 12:01 A. M., hour by hour, [111] to the following day.

A. From 12:01 to one o'clock, twenty-two miles per hour; from one to two, thirty-two miles with an extreme velocity of forty-four miles; two to three, twenty-seven miles per hour; three to four, twenty-one miles; four to five, twenty-three miles; five to six, twenty-four miles; six to seven, eighteen miles; seven to eight, twenty-one miles; eight to nine, twenty miles; nine to ten, fourteen miles; ten to eleven, thirteen miles; eleven to twelve, fourteen miles; twelve to one, ten miles; one to two, eleven miles; two to three, nine miles; three to four, ten miles; four to five, twelve miles; five to six, eight miles; six to seven, eight miles; seven to eight, six

(Testimony of Thomas R. Reed.)

miles; eight to nine, three miles; nine to ten, two miles; ten to eleven, three miles; eleven to twelve, five miles.

Q. That covers that day? A. Yes.

Q. Now, you have, do you not, in addition to the local reports, you have the weather maps which show reports from other observers, do you not?

A. Yes, sir.

Q. Now, what point of observation would be closest to San Clemente Island, and to the waters off the southern end of San Clemente Island?

A. Well, in point of actual distance, probably the nearest point would be Los Angeles.

Q. Well, if we should take Los Angeles reports, would those be reports of conditions prevailing at the same time in the southern part of San Clemente Island and in the waters off the southern part of San Clemente Island?

A. Not with respect to wind, not at all.

Q. And the reason being what?

A. Los Angeles is too sheltered.

Q. Exactly. How about any other neighboring point?

A. The best point on the coast to report, to reflect conditions [112] over those islands would be Point Arguello.

Q. I see. Have you the records showing conditions at Point Arguello with respect to wind velocity, say, commencing the 14th day of December, 1926? A. Yes.

Mr. SAWYER.—I might say, your Honor, the

(Testimony of Thomas R. Reed.)

purpose of this testimony is to show that the wind and weather conditions at San Clemente Island—I will connect all of this up with Point Arguello—I will show that the wind and weather conditions were such as to permit of successful whaling had we been there.

Mr. KENT.—That is, would have permitted the vessel to have navigated in some degree of comfort?

Mr. SAWYER.—No, I didn't mean that at all. I will show that the wind velocity was such as to permit it. Whales cannot be caught when the wind velocity is high.

Mr. KENT.—You don't think the wind would have any serious effects on the whales?

Mr. SAWYER.—No, I don't think it would affect the whales, but in the successful capture of them the weather conditions do, and I propose to show.

Q. Take beginning with the 14th, referring to your map, and give us the reports made by your observer at Point Arguello as to wind velocity, and going right through that report.

A. Going right through day to day?

Q. Yes; with this suggestion, that if you have any available reports, such as from ships in the vicinity, I would suggest that you give those also.

Mr. KENT.—You would oblige me by having the witness develop the connection between Point Arguello and San Clemente.

Mr. SAWYER.—Yes, I will do it right now.

Q. Mr. Reed, in the light of your fifteen years'

(Testimony of Thomas R. Reed.)

experience as [113] an observer, and your meteorological experience, what would you say as to conditions prevailing at Point Arguello as bearing upon the likelihood of similar conditions prevailing at the southern point of San Clemente Island and the waters off the southern part of San Clemente Island?

A. I think they would reflect wind conditions to a degree. Very probably, in my opinion, the wind velocities on Point Arguello would run higher than the wind velocities on the open sea to the west of there.

Q. Yes. So therefore the wind velocities shown at Point Arguello will probably indicate, in your opinion, a lesser velocity off San Clemente Island?

A. I think so.

Q. Now, give us those velocities as observed at Point Arguello.

A. On the 14th, the mean—the morning observations are taken at seven o'clock and the evening observations at five o'clock, Pacific time. If an equal velocity exists of not greater than twenty-five miles an hour during the preceding twelve-hour period there is nothing said, but if it exceeds that the observer appends information as to that fact in his message, so in those cases I have what is called the maximum velocity as well as the current velocity. Seven A. M., or five P. M. Take the morning observation on the 14th, the velocity was eighteen miles per hour.

Q. And what was the direction of the wind?

(Testimony of Thomas R. Reed.)

A. From the north, and a maximum during the night of thirty-four miles an hour, from the north.

Q. What was it on the afternoon of the 14th?

A. On the afternoon of the 14th, sixteen miles per hour, from the north.

Q. And the next day?

A. The morning of the 15th, northeast, ten miles per hour.

Q. And the afternoon of that day?

A. The afternoon, north, [114] twenty-eight miles per hour.

Q. Now, the morning of the 16th?

A. North, sixteen miles per hour.

Q. In the afternoon?

A. North, twelve miles per hour.

Q. Now, on the 17th, what was the velocity in the morning as observed at Point Arguello?

A. North, eight miles per hour.

Q. The direction of the wind? A. North.

Q. And in the afternoon?

A. North, fourteen miles per hour, in the afternoon of the 17th.

Q. And on the morning of the 18th? That is, the next day, isn't it?

A. Yes. Northeast, twenty-two miles per hour.

Q. And in the afternoon?

A. North, thirty miles per hour; which was the maximum for the twelve-hour period.

Q. Now, on the 19th?

A. Northeast, eighteen miles per hour with a

(Testimony of Thomas R. Reed.)

maximum of thirty-six miles per hour from the north.

Q. Yes. Now, on the afternoon of the 19th?

A. Northwest, twenty-eight miles per hour, which was also the maximum for the day.

Q. I see. That covers the 19th? A. Yes.

Mr. SAWYER.—That is all. You may cross-examine.

Cross-examination.

Mr. KENT.—Q. The dates of your observations at Point Arguello cover from the 14th to the 19th, both inclusive?

A. Yes.

Q. Just one or two questions with regard to the relationship between Point Arguello—Point Arguello is located where?

A. North, but slightly to the west of Point Concepcion, which is the point which juts out into the ocean at the dividing line between what we call northern and southern California.

Q. Just roughly, that is how far from San Francisco? [115] A. I don't know.

Q. About half way between San Francisco and Los Angeles?

A. Oh, no, fully two-thirds of the way, much nearer Los Angeles.

Q. And how far is San Clemente Island from that point?

A. I haven't scaled it off on the map, but roughly between a hundred and a hundred and fifty miles.

(Testimony of Thomas R. Reed.)

Q. It is safe to say that it is somewhere around a hundred miles?

A. Yes, it is over one hundred miles.

Q. And you say that the velocity of the wind at Point Arguello is liable to be greater than around San Clemente Island?

A. Yes, on the point it is higher, because those points are higher than the open sea and the wind is higher, the velocity of the wind increases, it increases with the altitude up to a certain point. That is accepted as a fact. I have found that to be a fact, and all of our observation stations at all such points, such as at Point Reyes, Cape Flattery, Tatoosh Island, and San Juan de Fuca, the winds are invariably higher than they are at sea. I have had, of course, ample opportunity to judge of that because of my interest in maritime affairs, and the shipping coming in and going out to sea, and the reports we have from the ships. Another thing, there is always a certain draft at these points.

Q. Can you give us any idea of the approximate difference, judging from your experience in these matters, difference between the wind velocity at one of these promontories, and at sea? Is there any fixed differential?

A. No, I wish there were, but the weather doesn't work out that way, but I would say, roughly, that it is always one point higher on the Beaufort scale.

Q. That would be a difference of what, in miles?

A. The Beaufort scale runs from one to ten, nothing to twelve, [116] rather, and is used

(Testimony of Thomas R. Reed.)

to indicate the force of the wind, those points are called force on the Beaufort scale. For instance, a force of three would mean a wind around twelve miles an hour. A force of four would be a wind of around sixteen miles an hour. Then there is a variation between the points of somewhere around five or ten miles an hour, it increases as you go up.

Mr. SAWYER.—Why don't you ask him for the Beaufort scale. Have you that scale with you, Mr. Reed?

The WITNESS.—Yes.

The COMMISSIONER.—Let it go in as an exhibit, the libellant's exhibit next in order. I think we had one exhibit at the previous hearing.

(The document was then received in evidence as Libelant's Exhibit No. 2.)

Mr. KENT.—Q. Mr. Reed, is there any exception to the relationship between the wind force at, we will say Point Arguello, and we will say some point out in the open ocean, say 100 miles west?

A. I would say offhand, if you go out west it is conceivable that you might have a storm at sea while the winds have not yet reached the coast at all.

Q. Now, we will take the two points mentioned here, Point Arguello and San Clemente Island, the sea around San Clemente Island. Isn't it possible that there would be some different pressure areas one place than another?

A. Not under those conditions, because you know in pretty near all cases it is a north wind and San

(Testimony of Thomas R. Reed.)

Clemente Island is very nearly due south from Point Arguello, a little west. If the barometric gradient as shown by the chart calls for a certain kind of wind, it conforms very closely to the requirement of the gradient. Under those conditions you would simply make Point Arguello data and it would [117] be quite justifiable to use that data for that purpose, indicating a higher velocity or higher velocities at the point than existed at sea.

Q. Your testimony had only to do with the wind velocity and not as to sea conditions?

A. Absolutely.

Mr. KENT.—That is all.

Redirect Examination.

Mr. SAWYER.—Q. You were asked the question by Mr. Kent with regard to comparisons between land and sea observations. Now, as a matter of fact don't you also have sea observations? On some of those dates you were given observations, on some of those dates for which you were giving observations at Point Arguello, didn't you have observations from ships showing less velocity than appeared for Point Arguello?

A. Yes.

Q. And I also asked you to give us those. Will you do that, please, give us the observed velocity, and then give us the velocity observed on the ship?

A. Yes, sir, but one of our troubles in the Weather Bureau is the fact that there isn't enough ships. I have turned over a number of reports without finding one with a ship's report on it.

(Testimony of Thomas R. Reed.)

Q. You mentioned, to me, one I think?

A. *The* We didn't go as far as the 19th with that testimony did we?

Q. Yes, we took in the 19th; I think we did. Well, give it to us for the 19th.

A. The morning of the 19th the S.S. "Calawaii" reported a velocity of sixteen miles from the north. She was proceeding out of Los Angeles at that time, and I would say 200 miles out from Los Angeles.

Q. What bearing from Point Arguello?

A. Southwest of Point Arguello.

Q. And about 200 miles? A. Roughly [118]

Q. What was the report for Point Arguello at that time?

A. Eighteen miles, at ten o'clock, and the "Calawaii's" report at four P. M.

Q. And what was the "Calawaii's" report?

A. North, sixteen miles.

Q. I see. Isn't there one place there where the "Calawaii" reported again?

A. She came in that evening; she was at 121 west, she reported sixteen miles.

Q. And what was Point Arguello?

A. Point Arguello was northwest, twenty-eight. I have the "Levant Arrow" at 35 north and 125 west, due west of Point Arguello, reporting; north sixteen miles.

Q. Now, in regard to the difference between velocity at San Clemente Island or the southern part of it and the waters off the point, and the velocity off

(Testimony of Thomas R. Reed.)

Point Arguello, I believe you stated the difference to be about one degree on the Beaufort scale?

A. I was not localizing, the higher the velocity of the wind at the land station, the greater the error, the greater the variation, and the greater the difference would be between the two points. I was speaking of the difference on the open sea.

Q. You say, the higher the velocity on the land point the greater the error. In other words, with higher velocities the difference would be greater?

A. Yes, at that time we were using a four-cup ammomometer, and it is a well-known fact that as the velocity increases the error in that ammomometer increases, that would be an instrumental error alone, to say nothing of what might creep in from the air sucking over a point like that.

Q. Then I take it, it would be fair to say that the observed [119] velocities at Point Arguello would be materially greater than in the waters off the southern part of San Clemente Island?

A. That would be my opinion, unquestionably, yes.

Mr. SAWYER.—No further questions.

The COMMISSIONER.—Is that all, Mr. Kent?

Mr. KENT.—Yes.

(Witness excused.)

TESTIMONY OF WILLIAM WESLEY SWADLEY, FOR LIBELANT.

WILLIAM WESLEY SWADLEY was thereupon called as a witness for the libelant, and having been first duly sworn, testified as follows:

Direct Examination.

Mr. SAWYER.—Q. Your full name, Mr. Swadley?

A. William Wesley Swadley.

Q. Where do you live, Mr. Swadley?

A. San Francisco.

Q. What is your occupation?

A. Commercial photographer.

Q. How long have you been engaged as such?

A. About twenty-five years.

Q. Were you called upon by the California Sea Products Company to make any photographs in the month of December, 1926? A. Yes, sir.

Q. What date did you make such photographs?

A. December 8th.

Q. Where were the photographs made?

A. They were made in the stream off San Francisco, out in the Bay.

Q. How far off?

A. Just outside, just off of the entrance to the Creek, China Basin.

Q. How many feet, or fractions of miles from the pier head line?

A. Oh, I would say a couple of hundred yards.

(Testimony of William Wesley Swadley.)

Q. Have you those photographs with you?

A. Yes, sir. [120]

Q. May I see them? A. Yes. (Producing.)

Q. There are just two of them?

A. Yes, two of the steamers, this photograph of the weather conditions on the pier that same day, taken in between the piers, seven and nine, that same afternoon.

Q. That photograph between the piers is in a sheltered position?

A. Yes, that happened to be a legal photograph I took that same day to show the weather damage on a barge of rice that is lying there. Just happened, a coincidence.

Mr. SAWYER.—We will offer these three photographs in evidence.

The COMMISSIONER.—They may be marked as one exhibit. Libelant's Exhibits 3A, 3B and 3C.

Mr. SAWYER.—No further questions. Have you any questions, Mr. Kent?

Cross-examination.

Mr. KENT.—Q. Did you say at what time the various pictures were taken that day, on the 8th?

A. The photographs of the "Lansing" I have not the exact time on, but they were made some time about the middle of the day; the light on them shows when they were made, the shadows are straight up and down, the light straight up and down.

Q. In your judgment it was about noon time?

(Testimony of F. K. Dedrick.)

A. Yes, and the other one was made at three P. M., it being a legal picture I have the time on it.

The COMMISSIONER.—You might mark them so that it will show.

(Thereupon the witness marks the photographs.)

Mr. KENT.—I think that is all.

(Witness excused.)

Mr. SAWYER.—I should like to recall Captain Dedrick, he [121] has already been sworn.

The COMMISSIONER.—This will be redirect examination?

Mr. SAWYER.—Yes, with the permission of Mr. Kent.

TESTIMONY OF F. K. DEDRICK, FOR LIBELANT (RECALLED—REDIRECT EXAMINATION).

F. K. DEDRICK recalled as a witness by the libelant, having been previously duly sworn, testified as follows:

Redirect Examination.

Mr. SAWYER.—Q. Captain Dedrick, the log of the "Lansing" shows that they went over to the Santa Fe dock to get water, leaving at 1:15 P. M. on the afternoon of December 8th. Will you state whether or not it is possible to go over and get water at the Santa Fe docks any time you like?

A. No, you cannot.

Q. Why not?

(Testimony of F. K. Dedrick.)

A. Because you have got to have high water to get in there.

Q. Are there any requirements about berthing time?

A. You can stay there any time, is that the question?

Q. Yes.

A. Yes, it is a busy berth, and they will only let you in at certain times.

Q. Could the "Lansing" have taken water at any time prior to one-fifteen on the afternoon of December 8th?

A. Just pardon me a minute. I think you got that mixed up. (Witness refers to Log Book, Libelant's Exhibit No. 1.) We went over on the 7th, four P. M. moved across the channel, fast at five-fifteen P. M., and took water all night.

Q. I beg your pardon. To amend the question. It appears the "Lansing" left Pier 46 at four o'clock and went over to the dock at five-fifteen P. M. A. Yes, Pier 46.

Q. This shows the inadvisability of counsel trying to testify. [122] Referring to your log, Captain, tell us when the "Lansing" left Pier 46 to go over to the Santa Fe dock for water?

A. "December 7th, four P. M., moved across the channel for filling water, fast five-fifteen P. M. Ed Nelson, Watchman."

Q. Now, I ask you whether or not the "Lansing" could have obtained water from the Santa Fe dock prior to five-fifteen P. M. on December 7th?

(Testimony of F. K. Dedrick.)

A. No, we could not.

Q. Why not?

A. Because there was another ship there.

Q. And why couldn't you have gotten in before December 7th?

A. Because the wharfinger wouldn't let us in there before.

Q. Did you get water for the "Lansing" as soon as it was possible to obtain it?

A. Yes, as soon as we was fast we got the hose on board and started to fill the water as fast as we could.

Q. And prior to the 6th you were still working on the bulkhead? A. Oh, yes, right up to the 7th.

Q. Yes, I think that is the testimony.

A. Another thing I want to say, we could only get a berth that night from the wharfinger and we had to promise to be out the next morning by high water.

Q. While the "Lansing" was lying at Pier 46 during the time the testing of the tanks was in progress, and during the time the collision repairs were being made, why couldn't coal and oil have been delivered to the "Lansing" before it left Pier 46?

A. Well, in the first place the hole in the side of the ship would have been below water if we loaded on there while it was being repaired.

Q. Yes, I see.

A. And in the second place there is no room there, the "Lansing" is there alone, there is very little room when the Santa Fe barges back out, in a little

(Testimony of F. K. Dedrick.)

place like that, and if you got work putting on a coal barge or oil barge in [123] there you make it so much smaller, and a vessel couldn't pass in and out.

Q. Was it practicable and feasible to supply the "Lansing" with coal and oil, or both, while lying at Pier 46? A. No, it couldn't be done.

Q. Now, when, according to your log, did the "Lansing" leave the Santa Fe dock, that is, the Channel Street dock?

A. One-fifteen P. M., left the dock assisted by two tugboats.

Q. On what date? A. December 8th.

Q. December 8th? A. Yes, sir.

Q. Did you experience any difficulty on the 8th in getting tow boats to remove the "Lansing"?

A. Yes, sir.

Q. What?

A. I had promised the wharfinger that we would get out by high water the next day, because they had another ship coming in there.

Q. And what time was that, high water?

A. Be about noon, about noon time or around one o'clock.

Q. On the 8th?

A. On the 8th, and I applied to the Merchants Tow Boat Company to take us out of there and they wouldn't take us out on account of the strong wind, so I got hold of Tom Crowley and told him that he has got to get us out of there, and finally he said, "I will send two tow boats there to take you out provided you take your own risk if you have any

(Testimony of F. K. Dedrick.)

damage." So I said, "All right, we will take our own risk," and we finally managed to do that without any damage.

Q. Now, after you got out on the 8th, I show you here Exhibits 3B and 3C and ask you whether or not, in your experience as a sea captain, it would have been feasible to bring coal barges alongside of the "Lansing" under the condition of the sea or the waters of the Bay as shown in the photographs? [124] A. Absolutely not.

Q. Why not? A. Because it's too rough.

Q. Now, when did you place your order for fuel, for oil? A. On the 8th, I believe.

Q. On the 8th?

A. The same day we left the Santa Fe wharf.

Q. When did you ask them to deliver it?

A. On the 9th, the following day.

Q. On the 9th? A. Yes.

Q. Just examine these documents that I am handing you and tell me what they are?

A. This is an order to the Arrow Oil Company for 5,000 barrels of fuel oil, ordered to be delivered on the 10th, that was altered due to the fact it was too rough on the 9th for the barge to come alongside, and the barge didn't come.

Q. Captain, you heard Mr. Reed's testimony, didn't you? A. Yes, sir.

Q. According to my recollection of that testimony it appears that the wind velocity had decreased on the 9th, they had been decreasing. Does the sea go down as quickly as the wind? A. No.

(Testimony of F. K. Dedrick.)

Q. Assuming that you had a wind of forty-five mile velocity on the 8th, in your experience in the vicinity of San Francisco waters off Piers 46 and 48, would those waters be calm the next day?

A. If it was absolutely calm the next day, and during the night the swell would go down, naturally, but it wasn't; on the 9th there was a plenty stiff wind in the morning, and when I called up the oil company they advised me that they considered it too rough to bring the oil barge up that day.

Q. That was on the 9th?

A. Yes, and we agreed that it was best to wait until the next day. [125]

Q. When was the delivery made?

A. On the 10th, in the morning.

Mr. SAWYER.—These records are copies from the orders from the Arrow Oil Company, and the Standard Oil Company of California, I didn't think it would be necessary to bring men from those companies over here.

Mr. KENT.—Very well.

Mr. SAWYER.—Here again, I have nothing but a letter from the King Coal Company. If you wish me to, I will bring the King Coal Company people, I will be glad to do it.

Mr. KENT.—It is not necessary.

Mr. SAWYER.—Q. Now, Captain Dedrick, do you recall when you gave your order to the King Coal Company for the coal?

A. We had ordered the coal for some time, you know, and it had been sacked over at the King Coal

(Testimony of F. K. Dedrick.)

Company bunkers at Oakland, and put in a barge and was waiting *from* orders from us to deliver in the stream to the "Lansing," and on the 8th, as far as I remember, I phoned to them and told them to bring the barge alongside in the stream, because we were leaving San Francisco on the 8th. Then on the 9th it was too rough in the morning, and we got in communication with them and they told us it was too rough to bring the barge alongside that day, better wait until next morning, which they did and the barge came alongside and we worked coal all that morning and part of the next day.

Mr. SAWYER.—I offer in evidence the order on the Arrow Oil Company, and the delivery order of the Standard Oil Company of California.

The COMMISSIONER.—They may be marked as Exhibits 4A and 4B for the Libelant.

Mr. SAWYER.—Q. I call your attention, going back to Exhibit [126] 4A, I call your attention to the fact that the date "Dec. 10" is evidently written over an erasure; how do you explain that?

A. That was probably done when we got in telephone conversation with them, where we agreed the Bay was too rough.

Q. Well, the erasure is of what date?

A. It shows "10" here.

Q. Underneath there is what?

A. Looks like originally "9," because it was ordered on the 9th.

Mr. SAWYER.—I will offer in evidence a letter dated December 11, 1928, from the King Coal

(Testimony of F. K. Dedrick.)

Company, to the California Sea Products Company.

The COMMISSIONER.—It may be received and marked as Libelant's Exhibit No. 5.

Mr. SAWYER.—Q. Now, Captain, it appears from Exhibit 5 that the Barge King No. 3 was moored alongside the "Lansing" in the stream about eight o'clock in the morning of the 10th. It also appears that on December 11th, about five o'clock in the afternoon the barge was taken away and returned to her berth?

A. Yes, that's right.

Q. It further appears that not until December 15th, four days later, there was another barge, at that time the King No. 3, placed alongside the "Lansing," and that it was removed therefrom on the afternoon of December 16th, at or about five o'clock P. M. What was the reason for the delay in getting the coal to the "Lansing"?

A. Well, the reason was, this coal had been sacked and in the barge for quite a while waiting for these repairs to be made, you know, six days' delay there. During that time they had some rain and the sacks got rained on, and then when we started to load the sacks got rotten from the rain and burst open. We tried one time to resack them right alongside the ship, [127] but we found it was such hard work to do, and slow work to do, that way, we decided it was better to send the barge back to the dock, over to Oakland to their bunkers to do the resacking there, while we con-

(Testimony of F. K. Dedrick.)

tinued our program of going on to California City, which we did. We returned from California City when the sacks, when the coal was put back in the sacks.

Q. So simultaneously, then, as I *un*stand it, you carried out your program of going to California City? A. Yes, we did.

Q. But you couldn't go to sea without the coal?

A. Certainly.

Q. And this shows the invoice for the resacking, that is it shows it was resacked? A. Yes, sir.

Mr. KENT.—You are not charging us for the resacking?

Mr. SAWYER.—Oh, no. I offer in evidence this invoice of the King Coal Company, only to show the delay caused by the resacking. It is cumulative evidence.

Mr. KENT.—No objection to it for that purpose.

The COMMISSIONER.—It may be received and marked as Libelant's Exhibit No. 6.

The WITNESS.—May I be allowed to speak?

Mr. SAWYER.—Depends on what you want to say, we want to get facts.

The WITNESS.—You can see from the records, just as soon as the coal was on board ship we proceeded to sea on the 16th, no delay, went right to sea.

Mr. SAWYER.—Q. Captain, what are the conditions which make whaling prohibitive?

A. Well, if it is too rough you can't chase whales,

(Testimony of F. K. Dedrick.)

because the ships can't stand it, and we can't proceed chasing them at all. [128]

Q. You heard Mr. Reed's testimony as to the velocity prevailing at Point Arguello? A. Yes.

Q. During the period from the 14th of December on? A. Yes.

Q. And you heard his testimony to the effect that in his opinion the velocity would be perceptibly less off the southern point of San Clemente Island?

A. Yes. All of those days were all right, except the last day, I think the 19th, when he said it was thirty-five miles. Our experience down at San Clemente—we get weather reports from all those points on the coast every night at eight o'clock, and invariably when it is blowing a strong wind at Point Arguello we have invariably calm or very light winds at San Clemente. We haven't had half a dozen strong winds down there the whole summer. You will find all these coasting captains will tell you after you get past Anacapa Island the wind dies right down, only a strong breeze. After you get down past there it dies out.

Q. You have been in the whaling business a number of years? A. Well, the last ten years.

Q. And you have been aboard the "Lansing" and other boats? A. Yes, sir.

Q. And you are thoroughly familiar with the operations of whaling? A. Certainly.

Q. Will you tell me whether or not the weather conditions described by Mr. Reed constituted whal-

(Testimony of F. K. Dedrick.)

ing weather off San Clemente Island, the sea south of San Clemente Island?

A. Yes, I certainly would say so.

Q. Now, at the close of the last hearing there was one question raised about the steamer "Erfurt," and Captain Swanson said that he was not on the boat at the time, but that you were? [129]

A. Yes, I was there.

Q. Just tell us what happened at that time.

A. I think it was Sunday morning. I was down watching the work going on, and this steamer came in, I think crossing from Oakland in charge of a pilot. There was quite a breeze that morning from the south, and this wind was blowing broadside against him and he was trying to get in to the inner berth in the channel on the south side, and he had no tug to assist him, so in order to turn around he dropped his anchor right outside of the Santa Fe slip and the wind swung his stern around and hit our top-work above the bridge deck on the port side, the damage was very little.

Q. Did it delay you in any respect?

A. None whatever, they repaired it, the pilot.

Q. Look at your log for November 25th, I think that thing happened on November 25th.

A. Yes, November 25th, 9:45 A. M. Steamer "Erfurt"—

Q. (Interrupting.) You don't need to read it. Is that the day, according to the log, this accident was caused by the "Erfurt"?

A. Broke one stanchion and some planks on the outer works, yes.

(Testimony of F. K. Dedrick.)

Q. Did that delay the departure of the "Lansing" whatever? A. None at all.

Mr. SAWYER.—Now, if your Honor please, we have some statistical data showing the whales that actually were caught after they arrived at the southern end of San Clemente Island, and upon the basis of that data we have compiled the cost per whale and the revenue per whale, and on the basis of that data we have ascertained the average daily catch of whales. We propose to use that figure for the purpose of estimating the catch that would have been made during the preceding six days, [130] had we been there. Now, in order to lay the foundation for Mr. Curtis' testimony, who is the auditor for the company and our statistical expert and accountant, I propose to show the number of whales that were caught, and the best evidence we have of that is the daily radio report, the daily check sent in by the fleet, and from the "Lansing." We can give you that in the form of a tabulation, but if you prefer to have it from the original records we have got them right here.

Mr. KENT.—I don't desire to put you to any unnecessary difficulty about it, and I presume that your statement and that of the captain that you received these reports covering these things is sufficient. Of course, as to the materiality, that is another thing.

Mr. SAWYER.—As long as there is no question as to the competency, I will get right to Mr. Curtis' testimony.

(Testimony of F. K. Dedrick.)

Mr. KENT.—I don't think that's necessary, I will take your word for it.

Mr. SAWYER.—Now, then, there are certain items in this statistical report which have been assumed by Mr. Curtis as the basis for his calculations, but the data which makes it up is within the knowledge of Captain Dedrick, and I now propose to ask him about that.

The COMMISSIONER.—Briefly, the Captain would know the number of whales captured each day, wouldn't he?

Mr. SAWYER.—Yes, but we have the whole thing here in statistical form and I think it will be simpler to put it in in that way.

The COMMISSIONER.—Very well, proceed.

Mr. SAWYER.—What I am going to ask him about is on Schedule 2 of this report, which report I ask be marked as libelant's [131] exhibit next in order.

The COMMISSIONER.—It may be received and marked as Libelant's Exhibit No. 7 for Identification.

Mr. SAWYER.—Q. Captain Dedrick, referring to Schedule No. 2 of Libelant's Exhibit No. 7 for Identification, there is an item, "Gunners' Supplies at $13.50 per whale." Now, will you tell us how that figure is arrived at?

A. Well, that is; that has been established from our experience in supplying all the supplies that a gunner on board of the whaler has to use in order to kill his whale. Now, it is established in this

(Testimony of F. K. Dedrick.)

way, we take an inventory—this is the items here, I give Mr. Curtis this amount. We usually take inventory at the beginning of each season on board the boats to see what gunner's supplies the gunner has to do with. Then during the season he is furnished with a certain amount of things he has used up, and at the end of the season we take an inventory of what he brings back, the difference in the inventory at the end of the season and the beginning of the season representing a certain amount of money used by the gunner, and this amount of money divided by the number of whales he has taken is represented by that $13.50 per whale, the cost. Now, you can itemize it here if you want to know.

Mr. KENT.—You might shorten it if you furnish us a statement of that.

Mr. SAWYER.—Q. What does this item mean, "Cost of gunners' supplies per whale"? How much it costs to shoot a whale?

A. Well, it depends whether you shoot one shot or a number of shots.

Q. Well, if only one?

A. There is the cost right there.

Q. Yes, but what is the cost?

A. $13.50, that's what [132] it averages.

The COMMISSIONER.—As I got it a little while ago, you have the cost of supplies there, and you divided it into the number of whales?

The WITNESS.—That is how we arrived at it, yes.

The COMMISSIONER.—Q. That is what it cost to kill one whale?

(Testimony of F. K. Dedrick.)

A. That is the average.

Q. You mean to kill one whale, or one shot? You would say here $13.50 for each shot?

A. There is another thing doesn't enter into it. We figure on lines, leaders we call it; we figure on an average it will last eight whales captured; sometimes that line will take fifteen whales, but we cannot arrive at that until the end of the season. That's the way we arrive at that, average cost per whale.

Mr. SAWYER.—Q. When I say how much does it cost to shoot one whale, I mean by that you take a season where you get a certain number of whales, how much is the average cost to reduce to possession each individual whale?

A. $13.50, that is what it costs, that is the average through a number of years.

The COMMISSIONER.—Q. That is the cost of ammunition and everything?

A. That is for the ammunition and several things we have to use in connection with a gun, such as rubber wads, the powder, wool wads, lines, harpoons, wire, everything, I have it all here on a list.

Mr. SAWYER.—Read it. Perhaps you better read it into the record.

The WITNESS.—Now, this is the average cost during a whaling season of gunners' supplies covering one whale at one shot per whale. This is what one shot would cost, I thought maybe you would want that: One harpoon bomb,—that is a cast-iron bomb [133] weighing ten pounds, which is

(Testimony of F. K. Dedrick.)

screwed on the end of the harpoon and explodes in the whale, cost $1.25. One pound whaling powder, cost fifty cents. One pound bomb powder, ten cents; one bomb ignition, cost seventy-five cents; one rubber gun and wad, cost eighteen cents; oakum, used for *wading* and cleaning gun, average ten cents each time; wool wadding, five cents; one cartridge, five cents; one harpoon, strap made of wire, the life of each is four whales. In other words, it is worn out after using four times. Cost $1.56 for one whale, then one shot will be thirty-nine cents. The harpoon which is used to kill the whale with weighs 150 pounds, and the life of a harpoon should be 100 whales, then it is worn out, you cannot use it any more. That harpoon costs $40, or one whale, $4. Life of the leader lines—

Mr. SAWYER.—Q. How can that be $4. Forty cents, wouldn't it?

A. Yes, that's right, forty cents, that's all right. The life of the leader line, which is four and a half in. manila rope, forty fathoms long, is for the capture of eight whales, nowe each one is of these leader lines cost $35.25, at the present time, that is specially made rope for the purpose, and for one whale it would be $4.40. Now, taking that $4 off, or $3.60 off the $4, makes that forty cents.

Q. That is the error on the cost of the harpoon.

A. All right, now, but there is more here yet—that is just an error in putting it down there, because I have got it down below here, too. Now, the average life of a main whale line—that is six inch

(Testimony of F. K. Dedrick.)

circumference manila, 2,000 feet long—is about two years, or two seasons. You may lose it before that, but on the average it is two seasons. Now, that line costs $1,200, or one season $600, and the average amount of whales in the season for one boat should be about a hundred whales, or [134] the cost shall be $6 a whale. Then you get $14.17.

Q. As the sum total of all those items you have just given, assuming that the addition is correct?

A. Yes.

Q. And taking into consideration the fact that the $4 item has been changed to forty cents?

A. That is just a mistake of figuring.

Q. The sum total of those items is what?

A. $14.17. You see there is something else there, there is times when a bomb don't explode and comes back to the ship again. Sometimes, as I told you before, the leader lines last a little longer. That, of course, at the end of the season when we figure out everything, goes to reduce this price of $14.17, and our average cost has been, through a year, $13.50 per whale. That is as near as we can get it.

Q. Referring to Schedule 2 of Libelant's Exhibit No. 7 for Identification, we find an item about half way down, "Less consumed in port, six days, 120 barrels, $124.80." That is the port consumption of oil. Where does that figure come from?

A. Well, can I see that, please? I haven't seen it yet.

Q. Yes. (Handing to witness.) Well, that is the amount of oil used by the "Lansing" while laying

(Testimony of F. K. Dedrick.)

down here at Pier 46, and repairing that hole in the side. You see, we had to keep steam up in the boiler all the time.

Q. You have that schedule right before you. I call your attention to another item, "Coal consumed, six days whaling, 30 tons at $12.50, $375." Do you see that? A. Yes, sir.

Q. Just explain that item, please.

A. That is the coal consumed by the steamer "Hawk" and the steamer "Port Saunders," they are whale killers.

Q. Attached to the "Lansing"

A. Yes. [135]

Q. And the "Lansing" is a whale reduction factory? A. Yes, sir.

Q. And the "Hawk" and the "Port Saunders" are killers attached to the "Lansing?" A. Yes.

Q. And you had two other killers?

A. Yes, the "Traveler" and the "Hercules."

Q. Why haven't you any coal consumption for them? A. They are oil burners.

Q. "Lubricating oil, and so forth, 6 days." do you see that? A. Yes, sir.

Q. Where do you get that?

A. That is the engineer's figures on what he has used on his machinery down there.

Q. That item is supplied by your engineer?

A. Certainly.

Q. Are those figures correct? That is, fuel oil, port consumption of 120 barrels?

(Testimony of F. K. Dedrick.)

A. Well, I haven't any way of checking, except the report the engineer gives out.

Q. That is the report?

A. Yes, and that is a very small item, those two usually burn more than that.

Q. "Coal consumed, six days whaling, 30 tons."

A. Yes, divided between two coal burning killer boats.

Q. In other words, the coal consumption—

A. These six whaling days, the coal consumption would average two and a half to three tons a day between the two. The "Port Saunders" is a little more than the "Hawk," but average that.

Mr. SAWYER.—That is all.

Recross-examination.

Mr. KENT.—Q. On your direct examination you referred to Libelant's Exhibit No. 7 for Identification. The first item you have testified to is $13.50 gunners' supplies for whales. [136]

A. Yes, sir.

Q. Are those figures based on your 1926 season after you got down to the whaling ground?

A. No, based upon our experience ever since we have been whaling, been in the business.

Q. That is, this $13.50 average is taken for the usual cost of the usual whales, over your entire operating period down to the present day, isn't is?

A. Yes, sir. It isn't the average over the entire period, but the average year, year by year. May I explain it?

(Testimony of F. K. Dedrick.)

Q. Yes, please.

A. When we first started in the whaling business it was up to us to figure out what it will cost. Then we have a station at Monterey and another at Trinidad, before ever having a floating reduction plant. We kept tab on everything, what it cost, an average shot, and everything like that, and took inventories at the beginning of the season and the end of the season in order to verify our estimates in the first place. What it would cost, we had an inventory taken and it always averaged around $13.50, average. Now, when we come to talk about what it costs to kill a whale we always say $13.50.

Q. Then I take it your answer to my original question is "yes"?

A. I can't see how else you can explain it. If you wish to do so, we can give you what it cost us this year to kill a whale.

Q. This is your case, I am asking you on what data you base your figures. I think your answer was clear enough. The next item, will you refer to these items next following, "Bonuses to crew," are they put in there on your information?

A. That is the bonus to each killer crew, each boat, each man according to what he does on the boat, he gets a certain bonus for every whale. That is the whale bonus.

Q. And this column, "killer boats at $58.50 per whale." [137]

A. That means that the boat that kills the whale

(Testimony of F. K. Dedrick.)

gets the bonus, the boat, the other boat, no, just that one boat gets it.

Q. Whatever boat takes them gets that bonus?

A. Yes. For instance one boat may bring in a whale to-day, that boat gets the bonus.

Q. Then, "S. S. 'Lansing' at $85.20 per whale."

A. Well, the "Lansing," you understand, is a reduction plant and the men that work on the reduction plant, they get so much per barrel of oil that is produced from that same whale.

Q. Is it a fixed amount of $85.20?

A. Yes, we average the number of barrels per whale, for instance at the end of the season we have made so many barrels of oil and that is divided by the number of whales and gives you the barrels per whale, average. We get about thirty barrels to the whale.

Q. Now, then, you refer to fuel oil consumed, six days' whaling. What days does that item refer to, Captain?

Mr. SAWYER.—No, I didn't ask him about that, I asked him about, "less consumed in port, six days, 120 barrels."

Mr. KENT.—Q. The "less consumed in port," covers what days?

A. During the days we were delayed there, during the repairs, before we got out.

Q. That is, they refer to the six days from the day following, from November 16th, six days following, is that it? A. That is the idea, exactly.

(Testimony of F. K. Dedrick.)

Q. You testified, however, as to coal consumed, six days whaling, did you not? A. Yes.

Q. Now, what six days does that represent?

A. That would be the six days we would be whaling.

Q. What six days are those, Captain, would you name the dates?

A. The idea is to show what we would have used during the six [138] days we would have been whaling when we didn't get down. Isn't that the idea of this, Mr. Sawyer?

Q. The six days prior to the 20th?

A. Prior to the—the 14th to the 19th.

Q. That is, you arrived on the whaling grounds on the 19th and you are now figuring the six days you should have been there, and which we are responsible for, are the 14th to the 19th? A. Yes.

Mr. SAWYER.—That's it.

Mr. KENT.—Q. How was this item computed, at six days' whaling at 30 tons? Were those six days consumption taken immediately following, or what days were taken to arrive at this 30 tons?

A. It is the general average of the amount of coal those two coal burners burn when running.

Q. Over what period of time is that average taken? A. Prior to our—I don't get that.

Q. This general average you refer to is the average for the year 1926 or the general average for the entire time you have used the boats?

A. Ever since the boats have been in the use of the company.

(Testimony of F. K. Dedrick.)

Q. Now, the real factor in determining whether you can catch a whale or not is not necessarily the wind velocity but the condition of the sea, isn't it?

A. Both, of course. There may be a big sea on and still we can hunt and chase whales, but if there is a short choppy, nasty sea, we can't.

Q. Then it is a fact the condition of the sea, as to the condition of the waves, choppiness of the water and such things of that nature, are the determining factors in arriving at whether or not you can start pursuing whales?

A. That's right. If it is rough you can't do much. [139]

Q. It is conceivable, isn't it, that although there might be a very light wind there would be a sea sufficiently heavy to prevent successful whaling operations?

A. No, that's very seldom. You may have a big sea sometimes, a long swell that don't hurt you at all, and it may be dead calm and still have that long swell. Then you may have only a sharp break and it will be choppy and hard to pursue whales, and hard to handle.

Q. Then there is no definite relationship between wind velocity and type of sea?

A. Yes, there is; the stronger it blows the rougher it gets.

Q. And you can hunt whales in moderate weather?

A. I would say with a wind velocity around

(Testimony of F. K. Dedrick.)

twenty miles you could hunt whales. Even with a higher wind velocity, you might.

Q. You could hunt whales even with a higher wind velocity, could you not.

A. Sure, if you are on the lea side of an island, you may have a wind of forty miles velocity, but that happens very seldom, you have to go where the whales are.

Q. Now, as to your location at Pier 46, where were you tied up at Pier 46?

A. The south side, inner berth.

Q. How close to the shore end—were you at the shore end of the pier?

A. Yes, shore end of the pier; you have reference to the accident?

Q. Yes, when you were tied up there, and when you testified you could not take on oil and coal, where were you?

A. On the south side, inner berth, Pier 46.

Q. Now, then, is that the shore end or the outer end?

A. Well, the inner berth is the shore end of it.

Q. Now, then, the record shows that the repairs to the plates were finished on November 22d. That is correct, isn't it? A. Yes, I believe it is. [140]

Q. Now, if this condition you refer to as to lack of room did not obtain, you understand—

A. Yes.

Q. —you could have begun loading your coal and oil immediately after the completion of the repairs on the 22d, could you not?

(Testimony of F. K. Dedrick.)

A. Where could we have loaded it at the pier?

Q. I say, assuming for the purpose of my question that there was room to bring a boat in alongside the "Lansing" as she was moored at Pier 46, you could have begun loading of your coal and oil after the repairs were completed on the 22d of November?

A. No, we couldn't, because the coal and oil went into the forward end of the ship.

Q. The oil was loaded where?

A. Forward, the forward end of the ship in No. 2 and No. 3 tanks.

Q. What would you have had to do in order to load oil?

A. Had to tighten the bulkhead so the oil wouldn't leak into the water in No. 1.

Q. That was not completed then?

A. No, not tested out.

Q. When was it completed?

A. The 7th of December.

Q. Do I understand, then, this repair of the tightening of the bulkhead wasn't completed until the 7th of December?

A. I think so, and then they—my recollection is that the tightening of the tanks had reference to the water-tanks, tanks for both water and oil in the forward end of the ship, so the oil don't leak into the water, that is why the bulkhead had to be tight.

Q. The testimony had reference to the water-tanks, Captain? A. Yes.

(Testimony of F. K. Dedrick.)

Q. Then do I understand that the oil-tank in which this oil was to be pumped was immediately adjacent to the water-tanks? A. Yes. [141]

Q. How about the coal?

A. The coal had to go into the forward hold and you couldn't put that in, not until the No. 1 tank is fixed. The forward bulkhead of No. 1 tank is the aft bulkhead of No. 1, cargo hold, and the 300 tons of coal had to go in the cargo hold. We couldn't put the coal in the cargo hold before the bulkhead of No. 1 is tight, because there is no way of repairing it after the coal was in, you couldn't get at it.

Q. These orders, the order in regard to the delivery of oil, I think it shows a delivery on the 10th. That was delivered by an oil barge?

A. Standard Oil barge, yes.

Q. Was the order for the barge to come alongside given by yourself? A. By myself, yes.

Q. On the 8th of December? A. Yes.

Q. And were there any orders given by you further than ordering the oil on the 8th from the Standard Oil Company?

A. Well, I ordered it through the Arrow Oil Company, and they in turn order from the Standard Oil Company.

Q. What orders did you give on the 8th of December?

A. I give the Arrow Oil Company an order for 5,000 barrels on the 8th to be delivered on the 9th.

Q. Did you give them any order at all after that?

A. I did.

(Testimony of F. K. Dedrick.)

Q. What?

A. On the following day, the 9th, I phoned them and we come to the conclusion it was unwise to bring the Standard Oil barge alongside because it was too rough.

Q. Then the point is you instructed them—

A. (Interrupting.) We consulted with the Standard Oil Company and they said it was too rough, better wait until the next day until it smoothed down. [142]

Q. Did you give them an order to wait, or was it an agreement between you?

A. I didn't order them not to, nor did they order the barge not to do it, but they claimed it was too rough and couldn't be done.

Q. And you acquiesced in that arrangement?

A. Certainly, I knew it was too rough.

Q. And as to the order for the coal; it was substantially the same thing?

A. They phoned me and told me it was too rough and they couldn't bring it over that day.

Q. You consulted with them and decided the barge shouldn't be brought over until it was finally brought; is that it?

A. Exactly. We were anxious enough to get the boat out, but didn't want to have any trouble.

Q. What effort did you make to go alongside the Santa Fe wharf on the 7th for water?

A. On the 7th, I think, five P. M. we moved the ship over there.

Q. On the 7th? A. In the evening.

(Testimony of F. K. Dedrick.)

Q. Did you try to go over before the 7th?

A. I did. I talked to the wharfinger, and we worked night and day to try to get over when we did, because he said that is the only time we can have.

Q. Then you were not ready, as a matter of fact, until the day you went over there?

A. That is, he hasn't a date for us to go over. He said, "If you can slip in and take water and be out by the high tide you can go there, but that is the only time."

Q. Who was it you talked to?

A. To the wharfinger.

Q. Do you know who he was?

A. I don't remember his name. He is down there in the Ferry Building.

Q. He has charge of the berthing of vessels?

A. Yes, sir. [143]

Q. That is the same wharfinger there now as was there in 1926?

A. I presume he is. I don't know. I haven't had anything to do with him lately.

Mr. KENT.—That is all.

Redirect Examination.

Mr. SAWYER.—Q. Is there any substantial difference in the cost of whaling supplies—talking now about this item of $13.50—between 1926 and years prior thereto?

A. Well, 1926 and prior thereto, you say?

(Testimony of F. K. Dedrick.)

Q. Yes. I want to know whether prices rose or fell?

A. Well, they are higher now than in 1926.

Q. Exactly. So when you take this figure of $13.50, is that figure more or less than it is to-day, that is, actually? A. It would be more to-day.

Q. Now, with relation to the relationship between wind velocity and wave. If you, as a seaman, are told that the velocities prior to a given date have been such and such, are you, in the light of your experience, able to tell what the condition of the sea would be?

A. Well, it certainly would be rough the—

Q. (Interrupting.) No, not assuming any velocity whatever. My question to you is, would you as a seaman be able to determine what the condition of the waves would be if you knew what the wind velocity was on the preceding day?

A. Well, if the velocity hasn't been much, there wouldn't be much of a sea, but if it has been blowing hard there would be.

Q. If I should give you the velocities for six days at a given point— A. Yes.

Q. —could you tell me, after inspecting those velocities, what the condition of the sea would reasonably be expected to be?

A. Yes, as I said, it depends entirely on the velocity. [144]

Q. Exactly. Referring to the velocities given by Mr. Reed— A. Yes.

(Testimony of F. K. Dedrick.)

Q. — what kind of a sea would you expect, given those velocities? A. From the 14th to the 19th?

Q. Yes, generally speaking.

A. I would say moderate to smooth.

Q. Would that or not have permitted whaling?

A. Yes, it would have; except one day when he reported thirty-nine miles per hour.

The COMMISSIONER.—Q. How long before the sea subsides after a wind?

A. Depends a good deal on the area over which the wind is blowing, if it blows a long ways off, and off the coast, it is longer, but if it is only a local wind the sea calms down in much less time. Sometimes you will have a big sea and no wind, sometimes when it is blowing a long ways, offshore. Sometimes we can tell, say at San Clemente, we can tell two or three days if we are going to get a blow, because we get it down there, the sea, it may be blowing up north and the sea reaches down there. We have found this thing also; every night at eight o'clock when we get the report from the weather stations, maybe it will be blowing a gale of wind at Point Arguello and we have nothing but calm.

Q. Now, referring to your report for whales—this, I should have covered before, Mr. Kent.

Mr. KENT.—May I interrupt a moment, first. I would like to ask one more question of the Captain.

Recross-examination.

Mr. KENT.—Q. Referring now back to this Exhibit No. 7 for Identification and the item you have referred to as to coal consumed, six days whaling,

(Testimony of F. K. Dedrick.)

thirty tons at $12.50; of course the [145] amount of coal or the amount of oil, for that matter, that is consumed by those boats depends upon the distance they travel?

A. Well, this is over the average of a whaling season.

Q. I understand, but I wish you would answer; it depends upon the number of knots steamed by the vessel during the day?

A. No, not exactly; maybe going whole speed, half speed, or dead slow, they may be hunting whales right in sight of the reduction ship, she don't go any particular distance.

Q. Well, the point I make is, Captain, that the amount of fuel consumed has a direct relation to the miles traveled?

A. Yes, if the vessel travels to some particular place, but we don't go full speed, half speed, or any other speed; only according, so we can only get this figure from an average for a month for these boats.

Q. Yes, but during any given date the actual amount of fuel consumed, whether coal or oil, would vary very largely, would it not?

A. No, it doesn't.

Q. You have just now stated, Captain, that some days the vessel might kill within sight of the reduction vessel? A. Yes.

Q. Then in that case there would be very little fuel burned? A. Yes.

Q. And if the kill had to be made at considerable distance it would require more fuel? A. Yes, sir.

(Testimony of F. K. Dedrick.)

Q. Each day's hunt, is an entirely different proposition than the last? A. Sure, sure.

Q. One day you will find whales in one spot and another day in another? A. Yes.

Q. And all of those conditions vary from day to day, do they not? A. Yes, sir. [146]

Mr. KENT.—That is all.

Redirect Examination.

Mr. SAWYER.—Q. When you are capturing whales, your catch is uniform from day to day?

A. No, certainly not.

Q. I wish you would read into the record from your daily reports the catch of whales from day to day, beginning with Sunday, the 19th day of December, 1926?

Mr. KENT.—I wish to object to the testimony as immaterial. My objection is based upon the fact that I consider it immaterial what whales were caught after the time which we are charged for.

Mr. SAWYER.—My purpose in making the offer—I will connect it up—first, I wish to show what whales were caught after they arrived there.

Mr. KENT.—How do you know there were any whales before you arrived?

Mr. SAWYER.—We are going to compare that with our experience in other years, when they were there earlier, showing what conditions were; that is the only way we can get at it.

The COMMISSIONER.—This all goes in subject to your objection, Mr. Kent.

(Testimony of F. K. Dedrick.)

Mr. SAWYER.—Q. Read into the record the daily radios—by the way, those are from the "Lansing," the catch, sent by radio each morning to San Francisco?

A. The catch is sent by radio each morning to the San Francisco office, and that is followed up by a daily report mailed in whenever convenient.

Q. We have got the radio reports, if you would rather take it from that?

Mr. KENT.—Let the Captain testify from whatever is the best evidence.

Mr. SAWYER.—Q. Read the daily reports. [147]

A. Starting in when?

Q. The 19th, the steamer "Lansing" anchored—

Mr. KENT.—(Interrupting.) Do you want to furnish us copies of that instead of reading it in?

The COMMISSIONER.—How many reports are you going to put in?

Mr. SAWYER.—From December to the end of January.

The COMMISSIONER.—Why not let the reporter copy them into the record.

Mr. SAWYER.—Very well.

Mr. KENT.—Does the report show where the whales were killed?

Mr. SAWYER.—No, just shows delivery to the ship.

The WITNESS.—We have another book at the office which is a table of every day's work on the whaling grounds, showing the number of whales, and barrels of oil made up each day.

(Testimony of F. K. Dedrick.)

Mr. KENT.—Q. I mean, if you are whaling do you show that you catch a whale at such and such a point, and that you catch another at such and such a place?

A. The only way you can get that is from the steamer's log.

Mr. SAWYER.—The logs of the killers, but I don't know whether we have any for 1926 or not.

Q. Let me put it to you this way. You did get whales after you got there, on the following day?

A. Yes, when the boats came in they brought whales in.

Q. In December, 1926? A. Yes, sir.

Q. Have you ever fished down there for whales before December 19th of any year?

A. Yes, 1927.

Mr. KENT.—Now, I want to object to this testimony, also, if the Commissioner please, upon the same grounds.

The COMMISSIONER.—It will be received subject to your objection. [148]

Mr. SAWYER.—Q. What do your reports show, roughly, with regard to whether or not whales were caught there before the 19th of December in other years when you fished there?

A. What do the reports show?

Q. Yes.

A. Show plenty of whales, of course.

Q. Prior to the 19th of December?

A. Yes, sir.

Q. Now, is there any uniformity in the whale run,

(Testimony of F. K. Dedrick.)

as you might call it, at or about San Clemente Island?

A. The couple of years we been down there we always found plenty of whales in December, especially the forepart of December.

Mr. SAWYER.—The rest of it we will put in a tabulation, the record for 1926 after you went down there.

The WITNESS.—For 1926.

Mr. SAWYER.—Q. And the record for 1927?

A. That's right.

Mr. KENT.—I think that the Captain's testimony as to his experience down there prior to the whaling date in 1926, with reference to 1927, that the records are the best evidence.

Mr. SAWYER.—Q. You were on the "Lansing" in 1927 and 1926, too, weren't you?

A. Yes.

Mr. KENT.—Then his testimony relates to 1926 and 1927?

Mr. SAWYER.—Exactly. I think that is all.

(Witness excused.)

TESTIMONY OF CHARLES G. CURTIS, FOR LIBELANT.

CHARLES G. CURTIS was thereupon called as a witness for the libelant, and having been first duly sworn, testified as follows:

Direct Examination.

Mr. SAWYER.—Q. Your full name, Mr. Curtis?

A. Charles Gainsford Curtis. [149]

(Testimony of Charles G. Curtis.)

Q. Mr. Curtis, where do you live?

A. 10 Lunado, Ingleside Terrace, San Francisco.

Q. What is your occupation?

A. Public accountant.

Q. How long have you been engaged as a public accountant? A. Since 1909.

Q. Whereabouts are you located?

A. 244 California street.

Q. Are you in business for yourself?

A. Part of the time, since 1920.

Q. Are you in the employ of the California Sea Products Company? A. I am.

Q. In what capacity? A. Auditor.

Q. How long have you been employed as auditor of that company? A. Since 1920.

Q. And are you familiar with the books and records of the California Sea Products Company?

A. Very familiar.

Q. Are they kept under your direction?

A. They are not exactly under my direction, but I check them up and verify them from time to time, but I have no authority over how they shall be kept.

Q. Have you examined the books of the California Sea Products Company for the purpose of determining the cost of operation of their enterprise? A. I have.

Q. And for the purpose of determining the revenues deprived therefrom? A. I have.

Q. Now, have you prepared that in the form of a statement? A. I have.

Q. I wish you would take our Exhibit No. 7 for Identification and commence on the first page, af-

(Testimony of Charles G. Curtis.)

ter your certificate, I wish you would take Schedule No. 1 of Libelant's Exhibit No. 7 for Identification and explain the items. How you arrive at those [150] figures. I think, Mr. Krull, this is going to be of interest to you if you would follow it.

A. This statement represents, first the sales of crews at San Clemente Island. The first item, No. 1 whale oil, so many pounds, sold for so much. That whale oil is total production for the year 1926, that is the rate, just what it was sold for, seven cents a pound; and the same for the No. 2 whale oil, at six cents per pound. The gross revenue from sales was the total sales charged to the different consignees, $79,935.70 for the total catch of oil for that cruise. Now sales expenses were the commissions and freight, and analysis, and so forth, which brought the total realized from sales down to six and a half cents per pound, roughly, and the amount in dollars and cents, is $4,980.20, leaving the total production and sale of oil $74,955.50.

Q. Why do you say roughly?

A. Because—I can give you the decimal, if you want it.

Q. Does it appear in your statement?

A. It does appear in my statement, .06547, it is a little over six and a half cents a pound.

Q. I see what you mean. Proceed.

A. That brings us to the net sales value of the oil, of $75,955.50. Now, going on down I give you the total catch of whales of 126 whales, from which over a million pounds of oil were produced; it is down here in the report 1,144,883 pounds of oil pro-

(Testimony of Charles G. Curtis.)

duced. Then the average poundage of oil produced per whale, 9,086 pounds. Revenue per whale, 9,086 pounds at .06547 gives you $594.86. The average catch of whales per day 2.69, so that the average catch of whales for six days would be 16.14, and the revenue from 16.14 whales at the rate of $594.86 per whale gives you the figure [151] of $9,601.04 as the revenue from 16.14 whales.

Q. That would be the gross revenue, would it not?

A. That would be the gross revenue.

Q. From— A. 16.14 whales.

Q. Which you assume might have been caught during the six days that they were not able to be there, had they been there? A. Yes, sir.

Q. And that is the basis of your statement?

A. Yes, sir.

Q. And your figure of nine thousand odd dollars— A. $9,601.04.

Q. —represents the gross revenue?

A. Gross revenue from those 16.14 whales.

Q. All right, now. Of course, it cost something to get the whales, doesn't it?

A. Yes, but in this case the cost would be going on just the same whether they were whaling or not, and—

Q. Exactly.

A. —And therefore to get at the basis of this claim you have got to deduct from that only excess cost that it would cost them to whale.

Q. Now, then, I want you to give to the Court— Now, there is a formula that you can use, can't you, for arriving at this result? Let me see if I cannot

(Testimony of Charles G. Curtis.)

develop it by questions. Now, if you take the total revenue derived from the entire trip—that, of course, can be calculated?

A. Yes, it is calculated here.

Q. Yes. Now, suppose you call that sum "A." Now, then, you can calculate the total expenses of the entire trip, can't you?

A. Yes, you can figure the total expenses.

Q. And suppose you call that sum "b"?

A. Yes.

Q. Now, if you subtract "B" from "A" the difference will be the [152] profit, won't it?

A. The profit, yes.

Q. Suppose you call that sum "C." "C" is the profit actually realized, isn't it?

A. That is right. This is taken from the books, this is taken right from the books.

Q. Now, it is our contention, Mr. Curtis, that if we had had six days more whaling than we did have— A. Yes, sir.

Q. —the profit would have been greater?

A. Exactly so.

Q. Now, if you take the total revenue represented by the sum "A" you can add to it the revenue from the December catch during the six days that we lost, can't you?

A. Yes; yes, that's true.

Mr. KENT.—Can't the witness state briefly how he arrives at the figures?

Mr. SAWYER.—Q. Well, all right.

A. I see what Mr. Sawyer is trying to develop. What he is trying to develop is, that if you add the

(Testimony of Charles G. Curtis.)

revenue to the total sales and add the excess costs to the costs, then you would get an adjusted profit and loss and the difference between the two answers would be the same as I have here.

Q. That is what I wanted to get at, that is what I wanted there.

A. You see, what you have lost is six days' whaling, and the expenses are very much the same whether you whale or whether you don't. Your ships still cost you money, so you don't have to put any extra days in here, you have to account for six days when we were idle. Therefore, we have got to arrive at a basis of saying what we could earn in six days. We have done that by taking an average from the actual catch, and we have set up the revenue by the average revenue per whale.

Q. This is schedule two you are working on now?

A. Yes. [153]

Q. All right, go ahead and explain that.

A. If you start with the supposition that you have got gross sales of a certain amount, and gross expenses of a certain amount, and profit of a certain amount; now you want to get at what the profit should have been if they had fished those six days more. Well, you have got to add to your profit as per these books, this estimated profit that you lost, and you have got to add to your expenses the extra six days' whaling expenses, and then you will get a profit which is above the book value by as much as this claim we are putting forward today. Now, that should explain what you want.

Q. Well, go ahead, now, on Schedule 2.

(Testimony of Charles G. Curtis.)

A. Extra fishing, killing, and production costs, entailed by six days extra fishing and catching 16.14 whales. Gunners' supplies at $13.50 per whale has been discussed here before, and that average has been used by myself in making statistics long before this case arose.

Q. That is, used by you in the business of the California Sea Products Company?

A. Yes, used by me in the business of the California Sea Products Company.

Q. And the bonus to the crew of the killer boats?

A. The bonus to the crew of the killer boats, $58.50 per whale, the details of which I have here. The captain gets so much, and the gunner so much, and it totals so much, there is a statement of it.

Mr. KENT.—May I ask a question?

Q. Does that have any connection with the boat, or does each killer boat have the same complement of men or is it different on the different boats?

A. The crews get the same, or similar bonuses.

Q. So that if Boat A killed a whale or Boat B, the bonus paid [154] and charged would be the same? A. Exactly the same.

Mr. SAWYER.—Q. Proceed.

A. The next item is the steamship "Lansing" bonus per whale. Now, that is calculated in a different manner. That is paid on the barrels of oil that they reduce from the carcass and each different rating receives a different rate. There are seventy men in the crew of the "Lansing," that doesn't matter very much—seventy-one men—well, they re-

(Testimony of Charles G. Curtis.)

ceive a bonus altogether for one barrel of oil of $3.61. Now, that is multiplied by the different barrels of oil to give you the bonus they receive on any certain catch. You see, $3.61 is the payment for one barrel of oil.

Q. Well, referring to your statement, Schedule 2, you have bonus here for the "Lansing" of $85.20 per whale?

A. That is reduced again to the whale, so many gallons to the whale.

Q. That you have shown in your other schedule, have you not?

A. Yes—I don't know whether it is shown there or not—yes, yes, there you are. That is shown there, multiplied pounds by the $3.61 which represents fifty gallons and then you get the result of $85.20 per whale.

Mr. KENT.—May I ask a question?

Mr. SAWYER.—Certainly.

Mr. KENT.—Q. How much do the whales vary in barrels of oil per whale produced; do you know?

A. Well, they don't vary very much.

Q. How much?

A. We figured fifty barrels to a whale all the way through, we used to; then lately we have reduced it to about thirty barrels per whale.

Q. Then would it be fair to say that the amount of oil extracted from a whale would run from thirty to fifty barrels? A. That is fair, yes. [155]

Mr. SAWYER.—Q. Is that right with you, Captain Dedrick?

(Testimony of Charles G. Curtis.)

Captain DEDRICK.—A. That is what I say, you don't get whales all the same size. I think they average to date about forty-two.

Mr. KENT.—Q. And in 1926, what did they average?

The WITNESS.—A. This is made from actual figures, average per whale, 9,086 pounds, you divide by 385 and that would give you the barrels.

Q. Those whales averaged—

A. That is about thirty, a little less than twenty-four barrels.

Captain DEDRICK.—Yes, they averaged less in 1926.

Mr. SAWYER.—9,086 barrels divided by 385, that is a little under twenty-four barrels.

The WITNESS.—That's right, for the San Clemente trip, those were small whales.

Mr. KENT.—Q. Do those whales vary per whale, that is, the heaviest whale and the lightest whales would vary approximately how many barrels?

Captain DEDRICK.—Sometimes we get one that won't go ten barrels, and then we get some that go sixty barrels. You see, we have taken an average.

Mr. KENT.—I understand from the captain now that they would run anywhere from ten to fifty barrels?

Captain DEDRICK.—Yes, sometimes sixty.

Mr. SAWYER.—Q. Well, on your figures, as I translate them, 9,086 pounds per whale would give an average of under twenty-four barrels per whale?

A. That is the absolute production report for

(Testimony of Charles G. Curtis.)

that cruise, and that is actual figures, that is no estimate.

Q. Very well. Proceed.

A. Fuel oil consumed, six days whaling. That is also made up from the actual report from the [156] amount of oil taken on board and divided up into those six days. That is the actual figure taken right from the books, and of course, divided down to six days. Of course, that would make an average, because there might be a variance over six days, but it is as near as you can possibly get from any books or any method. The "Lansing" consumed in port, six days, 120 barrels. That has to be deducted, naturally, because we are only dealing here with extra days. We would have cost in port. While in port they would probably have just a little steam up. I made the report up some months ago and at the time I think it was just half steam. Coal consumed, six days whaling, thirty tons; that amount is taken from the coal bills and divided up into the portion of the time for those six days. Lubricating oil, and so forth, six days; that is also taken from the bills.

Mr. KENT.—Q. When you refer to the bills, you refer to the bills covering 1926 operations?

A. Yes, I think I have them here, 1926 bills, actual bills for that period. Less wharfage and port lights; that is expenses in port that of course you wouldn't have while out on the grounds, six days at $15.10 per day, was taken from it.

(Testimony of Charles G. Curtis.)

Mr. SAWYER.—Q. As I understand, you were detained six days in port and you had these expenses? A. Yes, sir.

Q. Therefore, we are only getting the extra expenses?

A. That gives you the net extra fishing, killing, and production costs for six days.

Q. That is what you have in schedule 2?

A. That is the extra expenses that we would be put to if we caught whales on those six days.

Q. Exactly; the six days you were not on the grounds? [157] A. Yes, sir.

Q. Now, turn to your summary. The product of Schedules one and two and explain that?

A. Six days whaling with an average December daily catch of 2.69 whales, $594.86 per whale gives you a total revenue of $9,601.04.

Q. For the six days whaling?

A. Yes. Then I take away from that extra fishing, killing, and production costs shown in Schedule 2, which gives you the estimated profit lost by inability to fish for six days.

The COMMISSIONER.—And if you divide that by six, it will be for each day?

The WITNESS.—For each day, exactly.

The COMMISSIONER.—On the same basis?

The WITNESS.—Yes, sir.

Mr. SAWYER.—Q. You have taken an average of 2.69 whales per day? A. I have.

Q. All your figures so far have been calculated upon figures for the entire trip? A. They have.

(Testimony of Charles G. Curtis.)

Q. And your average of 2.69 is only the average for the month of December? A. That is so.

Q. The best fishing month? A. Yes, sir.

Q. The fishing falls off after that, according to our records? A. Yes.

Mr. SAWYER.—Here is the point. I want to be absolutely fair in the matter. You see, all of the costs are computed from the trip and we have taken the average of whales only for the month of December. That is the best month for whaling, a part of which we lost. Now, I want to be absolutely fair about this, but I want to submit the figures on the basis of the entire season, which gives us two and a quarter whales per day instead of 2.69. [158] I will ask you, I will ask the Court to rule whether we are entitled to the average for December, or for the entire season. From my own point of view we are entitled to the average for the entire period. Now, we have those on a supplementary schedule.

The COMMISSIONER.—Let those figures go in.

Mr. SAWYER.—Q. Just explain those figures.

A. The only difference in the figures on the supplementary report is that we take two and a quarter whales per day instead of 2.69.

Q. That is the only difference?

A. The difference is simply the multiplying of 13½ whales for six days by the revenue per whale, and you get the same amount, $8,025.61. The same way, all the way through, except the fixed costs, which don't change.

(Testimony of Charles G. Curtis.)

Q. What is the reason you took 2.69 for the calculation in your original report, and only 2.25 in your supplemental report?

A. Because I considered the month of December was the month in question, and the only way I could get my other costs, I had to take the whole season.

Q. Exactly. And when you took 2.25 whales per day, that is an average catch for the whole season?

A. For the whole season.

Mr. SAWYER.—I don't know that the certificate of Mr. Curtis should go in.

Mr. KENT.—I don't think that is proper.

Mr. SAWYER.—I will simply tear it out.

Q. I will simply ask you if the computations which you made, are, to the best of your knowledge, true and correct? A. Yes, sir.

Q. I will ask you now, Mr. Curtis, whether or not the figures embodied in your report, Libelant's Exhibit No. 7 for Identification, are true and correct, to the best of your knowledge and [159] belief, compiled from the books and records in your possession of the California Sea Products Company? A. They are.

Mr. SAWYER.—I offer Libelant's Exhibit No. 7 for Identification in evidence.

The COMMISSIONER.—Mr. Kent, have you any objection?

Mr. KENT.—I would like the record to include my objection to the entire exhibit, and to the testimony explanatory thereof, on the ground that the items shown are entirely too remote and specula-

(Testimony of Charles G. Curtis.)

tive and they are not the items charged as being directly caused by the accident complained of.

The COMMISSIONER.—It will be received subject to your objection.

Mr. SAWYER.—I will also offer in evidence, the supplemental report, as Exhibit 8.

Mr. KENT.—My objection, of course, will run to that also.

The COMMISSIONER.—The same ruling; it may be received subject to your objection.

Mr. SAWYER.—Q. The same statement is true, is it not, as to this supplemental report, this also was compiled from the books and records of the California Sea Products Company in your possession, and is a true and correct compilation according to the best of your knowledge and belief?

A. It is.

Mr. SAWYER.—I think that is our case, your Honor.

Cross-examination.

Mr. KENT.—Q. Mr. Curtis, would you refer to your schedule No. 1. Now, the first item is No. 1 whale oil, so many pounds at seven cents per pound, $77,625.70, and the second item is for No. 2 whale oil, thirty-eight thousand and some pounds at six cents per pound, $2,310.00. Where were those sales made? [160]

A. I have it, made in the books, made to Proctor & Gamble, and other people.

Q. In San Francisco?

(Testimony of Charles G. Curtis.)

A. Made from San Francisco, to various people.

Q. Made on the basis of f. o. b. San Francisco?

A. No, they were made—we pay the freight *an* analysis in some cases.

Q. To various points in the United States?

A. To various points in the United States; which are deducted in the expenses.

Q. And those sales were made between what dates, roughly?

A. Well, they were made between the time of—February the 12th—I can give it to you. I don't know exactly now, but I can give it to you, while stored here.

Q. Just generally speaking, would you say subsequent to February 12th?

A. Made in February, of 1927.

Mr. SAWYER.—The witness is now referring to the original books of the California Sea Products Company.

Mr. KENT.—Is there any current quotation or quotations on the two commodities indicated as Whale Oil No. 1 and Whale Oil No. 2?

A. Yes, they are all market prices.

Q. Is there any current quotation or any market published as to the prices?

A. Oh, yes, but these were sold under contract, most of them by our agent, W. R. Grace & Company.

Q. Did you contract for your output for 1926?

A. Yes, we had a contract with W. R. Grace & Company for Proctor & Gamble.

(Testimony of Charles G. Curtis.)

Mr. SAWYER.—The contract would be the best evidence, of course.

The WITNESS.—Yes, I suppose the best evidence would be the [161] contract itself.

Mr. KENT.—Yes, I suppose that would be the best evidence. If I am correct, the contract covered all the oil produced by your company?

The WITNESS.—All the number one oil, I think there was, but at any rate we sold all of it for that year at that price.

Q. Was there a fixed price for the number one oil?

A. It was the entire production in 1926.

Q. Was there a fixed price for it?

A. Yes, seven cents a pound.

Q. About the number 2 oil, how did you sell that?

A. The Standard Oil Company took some of that.

Q. Did you have a fixed price on that, of six cents per pound? A. That price was agreed upon.

Q. That price was agreed upon?

A. That price was agreed upon and actually sold at that price.

Q. And was the Standard Oil contract similar to the contract which you had for the number one?

A. I think it was sold through W. R. Grace & Company, probably on some spot quotation.

Q. Can you give us quotations, then, on number two whale oil during the month of February, 1927?

A. Six cents.

Q. That was the current market price?

A. That was the current market price, as far as

(Testimony of Charles G. Curtis.)

this Coast is concerned. You know there are very few selling whale oil on this Coast. I think there is one company up in Vancouver, isn't there?

Captain DEDRICK.—Seattle. We are practically the only whalers on this Coast.

Mr. KENT.—Rather than ask for the production of the contracts, I would like to get, briefly, for the record, the basis on which these articles are sold. [162]

Q. Then there is no market price for these commodities, because they are very rare on this coast; is that correct?

A. Oh, yes, there is, an Eastern market. But we have been in the habit of contracting to Proctor & Gamble through W. R. Grace & Company, who are our agents.

Q. For the year, 1926, as I understand it, you had a contract with Proctor & Gamble to take all of the production of number one whale oil at seven cents per pound? A. That is exactly it.

Q. As for your number two oil, you had no contract? A. No contract.

Q. But you sold to the Standard Oil Company, I take it, for the best price you could get?

A. That is exactly it. And we realized six cents for it, and that amount is shown from number two oil sold to Cook & Swan, on the 22d of April, 1927.

Q. That is, this whole lot?

A. The whole lot of number two oil, 38,500 pounds.

(Testimony of Charles G. Curtis.)

Q. The 38,500 pounds of number two oil, referred to in your schedule number one, were sold in April?

A. Were sold in April to Cook & Swan at six cents a pound.

The COMMISSIONER.—In making up the profit for the month of December, 1926, I think it was, do the books show profits for the preceding year, for the month of December, and the preceding year?

The WITNESS.—The books are not kept in that way.

The COMMISSIONER.—I know they are not kept in that way, but could you show it?

Mr. SAWYER.—They were not there before, because 1926 was the first year's operation. You see, the "Lansing" was not in operation before that. The "Lansing" is now their reduction plant. [163] They had been whaling with land stations and killers previous to that and the killers brought the whales in to land.

The COMMISSIONER.—That is true. That was in my mind and I wanted to clear it up.

Mr. SAWYER.—That is our case, with the exception of furnishing the reporter with those daily reports.

Mr. KENT.—And furnishing us with a diagram of the vessel.

Mr. SAWYER.—Yes.

Redirect Examination.

Mr. SAWYER.—Q. Oh, yes, under the contract

(Testimony of Charles G. Curtis.)

you had, and under the market conditions obtaining in 1927 when you marketed the proceeds of the actual 1926 catch, could you have disposed of the excess oil had you caught those sixteen and a fraction whales?

A. Yes, we could, because the whole catch was under contract.

Mr. KENT.—Q. By the "whole catch" you mean the number one oil only?

A. Yes.

Mr. SAWYER.—Q. How about the number two oil?

A. Oh, yes, that could have been sold.

Q. At the same price? A. Yes.

Mr. KENT.—That is all.

Mr. SAWYER.—That is all.

The COMMISSIONER.—The matter will be continued, then, to a date to be later agreed upon between the parties. [164]

EXTRACT.

"DAILY REPORT OF WHALE OIL STOCKS ON HAND."

"SS. 'LANSING' "—VOY. 1.

(As per stipulation on page 113 and following of transcript showing number of whales caught).

Date.	Steamer.	Today.	Month.	Season.
December 19, 1926	No whales.			
Dec. 20, 1926	Port Saunders	1	1	1
	Hercules	1	1	1
	Hawk	0	0	0
	Total	2	2	2
Dec. 21, 1926	Port Saunders	0	1	1
	Hercules	1	2	2
	Hawk	2	2	2
	Total	3	5	5
Dec. 22, 1926	No whales "Too rough outside."			
Dec. 23, 1926	Port Saunders	1	2	2
	Hercules	0	2	2
	Hawk	0	2	2
	Total	1	6	6
Dec. 24, 1926	No whales "Too rough for hunting."			
Dec. 25, 1926	Port Saunders	1	3	3
	Hercules	0	2	2
	Hawk	2	4	4
	Total	3	9	9

Continuation.

Date.	Steamer.	Today.	Month.	Season.
Dec. 26, 1926	Port Saunders	2	5	5
	Hercules	0	2	2
	Hawk	3	7	7
	Total	5	14	14
Dec. 27, 1926	Port Saunders	2	7	7
	Hercules	1	3	3
	Hawk	1	8	8
	Total	4	18	18
Dec. 28, 1926	Port Saunders	1	8	8
	Hercules	1	4	4
	Hawk	3	11	11
	Total	5	23	23
Dec. 29, 1926	Port Saunders	0	8	8
	Hercules	2	6	6
	Hawk	2	13	13
	Total	4	27	27

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Dec. 30, 1926	Port Saunders	2	10	10
	Hercules	1	7	7
	Hawk	2	15	15
	Total	5	32	32

Continuation.

Date.	Steamer.	Today.	Month.	Season.
Dec. 31, 1926	Port Saunders	1	11	11
	Hercules	1	8	8
	Hawk	1	16	16
	Total	3	35	35
Jan. 1, 1927	Port Saunders	1	1	12
	Hercules	3	3	11
	Hawk	2	2	18
	Total	6	6	41
Jan. 2, 1927	"No whales, too foggy."			
Jan. 3, 1927	"No whales. Dense fog."			
Jan. 4, 1927	Port Saunders	2	3	14
	Hercules	2	5	13
	Hawk	0	2	18
	Total	4	10	45
Jan. 5, 1927	Port Saunders	2	5	16
	Hercules	1	6	14
	Hawk	2	4	20
	Total	5	15	50
Jan. 6, 1927	Port Saunders	2	7	18
	Hercules	1	7	15
	Hawk	2	6	22
	Total	5	20	55

Continuation.

Date.	Steamer.	Today.	Month.	Season.
Jan. 7, 1927	Port Saunders	1	8	19
	Hercules	1	8	16
	Hawk	1	7	23
	Total	3	23	58
Jan. 8, 1927	Port Saunders	1	9	20
	Hercules	2	10	18
	Hawk	2	9	25
	Total	5	28	63
Jan. 9, 1927	Port Saunders	1	10	21
	Hercules	0	10	18
	Hawk	0	9	25
	Total	1	29	64
Jan. 10, 1927	Port Saunders	0	10	21
	Hercules	1	11	19
	Hawk	1	10	26
	Total	2	31	66
Jan. 11, 1927	Port Saunders	1	11	22
	Hercules	0	11	19
	Hawk	0	10	26
	Total	1	32	67

Continuation.

Date.	Steamer.	Today.	Month.	Season.
Jan. 12, 1927	Port Saunders	2	13	24
	Hercules	2	13	21
	Hawk	2	12	28
	Total	6	38	73
Jan. 13, 1927	Port Saunders	2	15	26
	Hercules	4	17	25
	Hawk	2	14	30
	Total	8	46	81
Jan. 14, 1927	Port Saunders	1	16	27
	Hercules	1	18	26
	Hawk	2	16	32
	Total	4	50	85
Jan. 15, 1927	Port Saunders	1	17	28
	Hercules	2	20	28
	Hawk	0	16	32
	Total	3	53	88
Jan. 16, 1927	Port Saunders	1	18	29
	Hercules	1	21	29
	Hawk	2	18	34
	Total	4	57	92

Continuation.

Date.	Steamer.	Today.	Month.	Season.
Jan. 17, 1927	Port Saunders	2	20	31
	Hercules	0	21	29
	Hawk	2	20	36
	Total	4	61	96
Jan. 18, 1927	Port Saunders	0	20	31
	Hercules	1	22	30
	Hawk (In Pedro)	0	20	36
	Total	1	62	97
Jan. 19, 1927	Port Saunders	0	20	31
	Hercules	1	23	31
	Hawk	0	20	36
	Total	1	63	98
Jan. 20, 1927	Port Saunders	0	20	31
	Hercules	1	24	32
	Hawk	0	20	36
	Traveler	0	0	0
	Total	1	64	99
Jan. 21, 1927		No whales		
Jan. 22, 1927	Port Saunders	0	20	31
	Hercules	1	25	33
	Hawk	1	21	37
	Traveler	1	1	1
	Total	3	67	102

Continuation.

Date.	Steamer.	Today.	Month.	Season.
Jan. 23, 1927	Port Saunders	1	21	32
	Hercules	0	25	33
	Hawk	1	22	38
	Traveler	1	2	2
	Total	3	70	105
Jan. 24, 1927	Port Saunders	1	22	33
	Hercules	0	25	33
	Hawk	1	23	39
	Traveler	0	2	2
	Total	2	72	107
Jan. 25, 1927	Port Saunders	1	23	34
	Hercules	0	25	33
	Hawk	0	23	39
	Traveler	0	2	2
	Total	1	73	108
Jan. 26, 1927	Port Saunders	0	23	34
	Hercules	2	27	35
	Hawk	0	23	39
	Traveler	2	4	4
	Total	4	77	112

Continuation.

Date.	Steamer.	Today.	Month.	Season.
Jan. 27, 1927	Port Saunders	1	24	35
	Hercules	0	27	35
	Hawk	0	23	39
	Traveler	0	4	4
	Total	1	78	113
Jan. 28, 1927	Port Saunders	0	24	35
	Hercules	0	27	35
	Hawk	0	23	39
	Traveler	1	5	5
	Total	1	79	114
Jan. 29, 1927	No whales "Too rough and stormy outside today to do any hunting."			
Jan. 30, 1927	No whales.			
Jan. 31, 1927	Port Saunders	1	25	36
	Hawk	0	23	39
	Hercules	0	27	35
	Traveler	0	5	5
	Total	1	80	115

[168]

EXTRACT.

"DAILY REPORT FLOATING FACTORY "LANSING," VOYAGE No. 4."

Date.	Steamer.	Today.	Month.	Season.
Oct. 29 1927	En route from San Francisco.			
Oct. 30, 1927	En route from San Francisco.			
Oct. 31, 1927	En route from San Francisco. Arrived San Clemente Island.			
Nov. 1, 1927	Hawk	1	1	1
	Hercules	0	0	0
	Traveler	0	0	0
	Total	1	1	1
Nov. 2, 1927	Hawk	1	2	2
	Hercules	1	1	1
	Traveler	0	0	0
	Total	2	3	3
Nov. 3, 1927	Hawk	1	3	3
	Hercules	0	1	1
	Traveler	1	1	1
	Total	2	5	5
Nov. 4, 1927	Hawk	1	4	4
	Hercules	1	2	2
	Traveler	0	1	1
	Total	2	7	7

Continuation, November, 1927.

Date.	Steamer.	Today.	Month.	Season.
Nov. 5, 1927	Hawk	1	5	5
	Hercules	0	2	2
	Traveler	2	3	3
	Total	3	10	10
Nov. 6, 1927	Hawk	1	6	6
	Hercules	2	4	4
	Traveler	1	4	4
	Total	4	14	14
Nov. 7, 1927	Hawk	1	7	7
	Hercules	1	5	5
	Traveler	1	5	5
	Total	3	17	17
Nov. 8, 1927	Hawk	1	8	8
	Hercules	1	6	6
	Traveler	0	5	5
	Total	2	19	19
Nov. 9, 1927	Hawk	1	9	9
	Hercules	1	7	7
	Traveler	2	7	7
	Total	4	23	23

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Continuation, November, 1927.

Date.	Steamer.	Today.	Month.	Season.
Nov. 10, 1927	Hawk	1	10	10
	Hercules	0	7	7
	Traveler	0	7	7
	Total	1	24	24
Nov. 11, 1927	Hawk	0	10	10
	Hercules	2	9	9
	Traveler	0	7	7
	Total	2	26	26
Nov. 12, 1927	Hawk	2	12	12
	Hercules	4	13	13
	Traveler	0	7	7
	Total	6	32	32
Nov. 13, 1927	Hawk	2	14	14
	Hercules	0	13	13
	Traveler	1	8	8
	Total	3	35	35
Nov. 14, 1927	Hawk	1	15	15
	Hercules	0	13	13
	Traveler	1	9	9
	Total	2	37	37

Continuation, November, 1927.

Date.	Steamer.	Today.	Month.	Season.
Nov. 15, 1927	Hawk	0	15	15
	Hercules	1	14	14
	Traveler	2	11	11
	Total	3	40	40
Nov. 16, 1927	Hawk	2	17	17
	Hercules	2	16	16
	Traveler	0	11	11
	Total	4	44	44
Nov. 17, 1927	Hawk	1	18	18
	Hercules	2	18	18
	Traveler	0	11	11
	Total	3	47	47
Nov. 18, 1927	Hawk	3	21	21
	Hercules	2	20	20
	Traveler	1	12	12
	Total	6	53	53
Nov. 19, 1927	Hawk	1	22	22
	Hercules	1	21	21
	Traveler	1	13	13
	Total	3	56	56

Continuation, November, 1927.

Date.	Steamer.	Today.	Month.	Season.
Nov. 20, 1927	Hawk	2	24	24
	Hercules	1	22	22
	Traveler	3	16	16
	Total	6	62	62

[170]

Nov. 21 1927	Hawk	2	26	26
	Hercules	1	23	23
	Traveler	3	19	19
	Total	6	68	68
Nov. 22, 1927	Hawk	0	26	26
	Hercules	0	23	23
	Traveler	1	20	20
	Total	1	69	69
Nov. 23, 1927	Hawk	3	29	29
	Hercules	1	24	24
	Traveler	1	21	21
	Total	5	74	74
Nov. 24, 1927	Hawk	2	31	31
	Hercules	2	26	26
	Traveler	1	22	22
	Total	5	79	79

Continuation, November, 1927.

Date.	Steamer.	Today.	Month.	Season.
Nov. 25, 1927	Hawk	1	32	32
	Hercules	0	26	26
	Traveler	0	22	22
	Total	1	80	80
Nov. 26, 1927	Hawk	1	33	33
	Hercules	1	27	27
	Traveler	2	24	24
	Total	4	84	84
Nov. 27, 1927	Hawk	0	33	33
	Hercules	1	28	28
	Traveler	1	25	25
	Total	2	86	86
Nov. 28, 1927	Hawk	1	34	34
	Hercules	1	29	29
	Traveler	1	26	26
	Total	3	89	89
Nov. 29, 1927	Hawk	1	35	35
	Hercules	0	29	29
	Traveler	0	26	26
	Total	1	90	90

Continuation, November, 1927.

Date.	Steamer.	Today.	Month.	Season.
Nov. 30, 1927	Hawk	1	36	36
	Hercules	3	32	32
	Traveler	2	28	28
	Total	6	96	96
Dec. 1, 1927	Hawk	0	0	36
	Hercules	1	1	33
	Traveler	2	2	30
	Total	3	3	99
[171]				
Dec. 2, 1927	Hawk	0	0	36
	Hercules	2	3	35
	Traveler	2	4	32
	Total	4	7	103
Dec. 3, 1927	Hawk	0	0	36
	Hercules	1	4	36
	Traveler	1	5	33
	Total	2	9	105
Dec. 4, 1927	Hawk	4	4	40
	Hercules	1	5	37
	Traveler	0	5	33
	Total	5	14	110

Continuation, December, 1927.

Date.	Steamer.	Today.	Month.	Season.
Dec. 5, 1927	Hawk	0	4	40
	Hercules	0	5	37
	Traveler	2	7	35
	Total	2	16	112
Dec. 6, 1927		No whales.		
Dec. 7, 1927	Hawk	1	5	41
	Hercules	0	5	37
	Traveler	0	7	35
	Total	1	17	113
Dec. 8, 1927	Hawk	1	6	42
	Hercules	2	7	39
	Traveler	1	8	36
	Total	4	21	117
Dec. 9, 1927	Hawk	1	7	43
	Hercules	1	8	40
	Traveler	1	9	37
	Total	3	24	120
Dec. 10, 1927	Hawk	0	7	43
	Hercules	0	8	40
	Traveler	3	12	40
	Total	3	27	123

Continuation, December, 1927.

Date.	Steamer.	Today.	Month.	Season.
Dec. 11, 1927	Hawk	1	8	44
	Hercules	2	10	42
	Traveler	3	15	43
		—	—	—
	Total	6	33	129
Dec. 12, 1927	Hawk	1	9	45
	Hercules	2	12	44
	Traveler	3	18	46
		—	—	—
	Total	6	39	135
Dec. 13, 1927	Hawk	1	10	46
	Hercules	0	12	44
	Traveler	3	21	49
		—	—	—
	Total	4	43	139

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Dec. 14, 1927	Hawk	0	10	46
	Hercules	1	13	45
	Traveler	0	21	49
		—	—	—
	Total	1	44	140
Dec. 15, 1927	Hawk	0	10	46
	Hercules	2	15	47
	Traveler	0	21	49
		—	—	—
	Total	2	46	142

Continuation, December, 1927.

Date.	Steamer.	Today.	Month.	Season.
Dec. 16, 1927	Hawk	1	11	47
	Hercules	1	16	48
	Traveler	1	22	50
		—	—	—
	Total	3	49	145
Dec. 17, 1927	Hawk	1	12	48
	Hercules	0	16	48
	Traveler	0	22	50
		—	—	—
	Total	1	50	146
Dec. 18, 1927	Hawk	0	12	48
	Hercules	0	16	48
	Traveler	0	22	50
		—	—	—
	Total	0	50	146
Dec. 19, 1927	Hawk	0	12	48
	Hercules	1	17	49
	Traveler	0	22	50
		—	—	—
	Total	1	51	147
Dec. 20, 1927	Hawk	1	13	49
	Hercules	0	17	49
	Traveler	1	23	51
		—	—	—
	Total	2	53	149

Continuation, December, 1927.

Date.	Steamer.	Today.	Month.	Season.
Dec. 21, 1927	Hawk	0	13	49
	Hercules	0	17	49
	Traveler	0	23	51
		—	—	—
	Total	0	53	149
Dec. 22, 1927	Hawk	1	14	50
	Hercules	0	17	49
	Traveler	0	23	51
		—	—	—
	Total	1	54	150
Dec. 23, 1927	Hawk	1	15	51
	Hercules	0	17	49
	Traveler	1	24	52
		—	—	—
	Total	2	56	152
Dec. 24, 1927	Hawk	0	15	51
	Hercules	0	17	49
	Traveler	0	24	52
		—	—	—
	Total	0	56	152
[173]				
Dec. 25, 1927	Hawk	0	15	51
	Hercules	0	17	49
	Traveler	0	24	52
		—	—	—
	Total	0	56	156
				(152)

Continuation, December, 1927.

Date.	Steamer.	Today.	Month.	Season.
Dec. 26, 1927		No whales.		
Dec. 27, 1927	Hawk	0	15	51
	Hercules	0	17	49
	Traveler	3	27	55
	Total	3	59	155
Dec. 28, 1927	Hawk	1	16	52
	Hercules	0	17	49
	Traveler	0	27	55
	Total	1	60	156
Dec. 29, 1927		No whales.		
Dec. 30, 1927		No whales.		
Dec. 31, 1927		No whales.		
Jan. 1, 1928	Hawk	1	1	53
	Hercules	1	1	50
	Traveler	0	0	55
	Total	2	2	158
Jan. 2, 1928		No whales.		
Jan. 3, 1928	Hawk	0	1	54
	Hercules	1	2	51
	Traveler	0	0	55
	Total	1	3	159
Jan. 4, 1928		No whales.		

Continuation, January, 1928.

Date.	Steamer.	Today.	Month.	Season.
Jan. 5, 1928	Hawk	1	2	54
	Hercules	0	2	51
	Traveler	0	0	55
	Total	1	4	160
Jan. 6, 1928	Hawk	1	3	55
	Hercules	0	2	51
	Traveler	0	0	55
	Total	1	5	161
Jan. 7, 1928	No whales.	"Boats did not return."		
Jan. 8, 1928	Hawk	0	3	55
	Hercules	0	2	51
	Traveler	1	1	56
	Total	1	6	162
[174]				
Jan. 9, 1928	Hawk	1	4	56
	Hercules	0	2	51
	Traveler	0	1	56
	Total	1	7	163
Jan. 10, 1928		No whales.		
Jan. 11, 1928		No whales.		
Jan. 12, 1928		No whales.		

Continuation, January, 1928.

Date.	Steamer.	Today.	Month.	Season.
Jan. 13, 1928	Hawk	1	5	57
	Hercules	0	2	51
	Traveler	0	1	56
	Total	1	8	164

Jan. 14, 1928 No whales. (Orders received to proceed to San Francisco.)

[Endorsed]: Filed Jul. 15, 1930. [175]

[Title of Court and Cause.]

HEARING ON REFERENCE.

Thursday, May 21, 1929.

Counsel Appearing:

For Libelant: H. M. SAWYER, Esq.

For Respondent: PLATT KENT, Esq.

TESTIMONY OF A. L. BECKER, FOR RESPONDENT.

A. L. BECKER, called for the respondent, sworn.

Mr. KENT.—Q. Mr. Becker, will you state your present business?

A. My present business is I am a consulting engineer, marine engineer.

Q. Will you please give us in detail your experience as a marine engineer?

A. I graduated from the University of Michigan in 1894; I served an apprenticeship at marine engine building four years, and two years in erecting marine engines. Then I went to Duluth, and

(Testimony of A. L. Becker.)

worked as chief engineer for the Craig Shipbuilding Company for seven years, and I came to [176] Long Beach, California, with Craig, as superintendent of the Shipyard that he started there, and remained in that capacity for ten years, about ten years. At the beginning of the war I came to San Francisco and took charge of the Schaw-Batcher Shipbuilding Company, at South San Francisco, and I built 18 vessels there. At the closing down of the shipyard I opened an engineering office in San Francisco, and I have got that office.

Q. Mr. Becker—

Mr. SAWYER.—Might I cross-examine just a minute on his qualifications?

Mr. KENT.—Sure, but I am about to develop his connection with tankers.

Mr. SAWYER.—Very well.

Mr. KENT.—Q. Mr. Becker, will you state whether, in your capacity as consulting engineer, at the time you left Schaw-Batcher, you had any connection with tankers?

A. Yes; I practically collected, surveyed and recommended for purchase the entire fleet of the Associated Oil Company.

Q. Have you had charge of the reconstruction or repair of any vessels of that type?

A. I had charge of the reconditioning, reconstruction, drydocking, testing of all of the vessels that I bought.

Q. Did you have charge of making arrangements for the contracts and the specifications for the work?

A. Yes.

(Testimony of A. L. Becker.)

Q. And superintend the carrying-on of the work?

A. Yes.

Q. Did any of the work consist in testing the tanks on the various vessels that you have characterized as tankers?

A. That is the main feature of repairs for a tanker, testing the tanks.

Mr. KENT.—Have you any questions you want to propound [177] now, Mr. Sawyer?

Mr. SAWYER.—No.

Mr. KENT.—Q. Mr. Becker, you were present, were you not, at the hearing of this matter held before Mr. Krull on February 23, 1928?

A. Yes.

Q. You were present, were you not, when the testimony of Captain Dedrick and also that particularly of Mr. Joseph Biggins was given? A. Yes.

Q. And since that time have you familiarized yourself with the reporter's transcript of the testimony taken at that date?

A. I have; I have read it.

Q. Now, Mr. Becker, let us assume a tanker approximately 400 feet long by 47.2 feet beam; can you give us any idea as to the lowering of that vessel in the water by placing thereon of any given weight?

Mr. SAWYER.—Objected to as immaterial, irrelevant, and incompetent, and calling for the conclusion of the witness, on the basis of no similarity between the situation now described, and the situation in this case; no dimensions are given of the

(Testimony of A. L. Becker.)

vessel, other than the length and beam, and no foundation laid for the question.

Mr. KENT.—We have requested from Mr. Sawyer at the previous hearing a blue-print showing full data as to the dimensions of the ship, and the only thing we have been able to get from Mr. Sawyer, or from his client, was a rough pencil sketch.

Mr. SAWYER.—I have got another one now, which was only delivered to me to-day, if you want that.

Mr. KENT.—I will be very glad to have it.

Mr. SAWYER.—Let the record show I am now producing a plan and elevation of the "British Queen," now known as the [178] steamer "Lansing." Mr. Egbert, this plan shows the condition before reconstruction, does it?

Mr. EGBERT.—Yes.

Mr. KENT.—Is there any question but that the steamer "Lansing" is 400 feet long, and has a beam of 47.2 feet?

Mr. SAWYER.—No, I do not think there is any question about that.

Mr. KENT.—My question is preliminary, and I think it is proper, and I will take a ruling.

The COMMISSIONER.—I will allow the question to be answered and let the objection be noted.

A. The "Lansing" is a moderately fine vessel—

Mr. SAWYER.—I object to that answer on the ground that it is not responsive. The question was based upon a hypothetical question. If you are going to talk about the "Lansing," that is another matter.

(Testimony of A. L. Becker.)

Mr. KENT.—Answer the question first with regard to any vessel, Mr. Becker.

A. I don't know as I understand the question.

Q. Read the question.

(Last question repeated by the reporter.)

A. Yes, by assuming a water line coefficient.

Q. I will refer you now to the sketch, or the map, or diagram just produced by Mr. Sawyer, indicating the steamer "Lansing," and ask you if, with the data you now have before you, you can determine any coefficient such as you have described?

A. I would say, without having the displacement curve, that the vessel had a water line coefficient of about .75.

Mr. KENT.—Is there any question about that data?

Mr. SAWYER.—I don't know. I will ask Mr. Egbert.

The COMMISSIONER.—Let Mr. Egbert be sworn. [179]

TESTIMONY OF EDWARD B. EGBERT, FOR LIBELANT.

EDWARD B. EGBERT, called for the libelant, sworn.

Mr. SAWYER.—Q. Would you state the facts as to the "Lansing's" dimensions?

A. I will state that the length by rule is 400 feet, the breadth 47 feet, the maximum loaded draft 26.7 feet, and the approximate dead weight 6906 tons.

(Testimony of Edward B. Egbert.)

Q. The draft is calculated on that dead wenght, is it not?

A. Yes, with that dead weight you get that draft.

TESTIMONY OF A. L. BECKER, FOR RESPONDENT (RESUMED).

A. L. BECKER, direct examination (resumed).

The WITNESS.—According to that, she would go 32 tons per inch of displacement.

Mr. KENT.—Q. What is your coefficient?

A. .75.

Q. That is, for every 32 tons that is placed on board the vessel, assuming it was spread evenly over the surface, or over the hull, it would lower the vessel in the water one inch?

A. One inch, that is 32 tons per inch.

Q. I will show you now, Mr. Becker, a free-hand sketch, marking or indicating certain tanks. Will you please explain what that shows with regard to the construction of the tanks indicated?

Mr. SAWYER.—Just a minute. Is Mr. Becker talking from his own knowledge?

A. Yes.

Q. Are you familiar with the "Lansing"?

A. I am famiialr with her.

Q. Have you ever seen the "Lansing"?

A. Oh, yes.

Mr. KENT.—He is entitled to assume, unless you furnish us with a set of facts which have to do with this vessel. We have asked for information as to the construction of the vessel, which was not fur-

(Testimony of A. L. Becker.)

nished, and I think we are entitled to make [180] such assumptions as we can from the data that we have. If that is not correct, it is up to you, I take it, to show it.

Mr. SAWYER.—I simply object to any testimony as that. I want to know whether Mr. Becker is testifying from hypothetical questions which are based upon evidence in the record, or whether he is testifying from his own knowledge. You started off with a hypothetical question. I don't know what you are asking now.

Mr. KENT.—I have asked him to explain what that diagram is, and what it indicates. We will see after he has answered that whether we can connect it up, or not. I might state here that we desire, Mr. Commissioner, a blue-print or diagram, or plan, or whatever you want to call it, giving the data as to the size of the tanks, and the construction; that was a request that I made at a previous hearing.

Mr. SAWYER.—That is perfectly true, and I want the record to show that we furnished you everything that we had.

Mr. EGBERT.—There is no plan extant, as far as I know.

Mr. KENT.—If that information is not forthcoming, which we are entitled to have, I think we are entitled to assume such facts as we can deduce from such meager information as we have. In other words, the burden is upon the other side to

(Testimony of A. L. Becker.)

show that that is not correct. To that extent, my questions are hypothetical.

Mr. SAWYER.—If they are hypothetical, then I submit they must be based upon evidence in the record, or evidence that you intend, yourself, to put in the record. That is, you must connect them with our evidence, or your own evidence.

Mr. KENT.—They are connected with your evidence, as far as they can be connected, in view of the fact that you have not been able, or at least have not furnished the information that we have requested. [181]

Mr. SAWYER.—All right, let us take it right there. We have furnished everything we have got. What was your question?

Mr. KENT.—Read the question.

(Last question repeated by the reporter.)

A. I have indicated on this sketch, which has been marked Respondent's Exhibit "B" for Identification, the usual method of constructing tanks in a vessel designed to carry oil.

Mr. SAWYER.—I submit right there, Mr. Commissioner, that this vessel was not designed to carry oil; she is designed to carry water; she is a water tanker.

The WITNESS.—She was carrying oil for many years.

Mr. SAWYER.—When she was reconverted she was not an oil carrier.

Mr. KENT.—Your own witness, here, has stated, at least I understood him to so state, whether it is

(Testimony of A. L. Becker.)

on record, or not, and, if it is not, I want it on record, that the sketch which I showed him just now marked Respondent's Exhibit "B" for Identification, indicated substantially the method of construction of tanks 1, 2, and 3 in the forward end of the "Lansing." Is that correct or not?

Mr. SAWYER.—I did not hear him say that.

Mr. EGBERT.—Yes, so far as the stiffeners are concerned. That is all it is supposed to indicate. I think it is.

The COMMISSIONER.—Proceed.

Mr. KENT.—Q. Proceed and explain the sketch, Mr. Becker.

A. In a converted tanker—I am talking about a new tanker—this arrangement in a converted tanker, the only different arrangement might be when she had an original bulkhead on the old ship as an oil bulkhead, the stiffeners are often left in place, but the new work is always stiffened up with one smooth side. The utility of this arrangement is this, that [182] alternate diagonal tanks carry the stiffeners for all of the bulkheads. This arrangement permits in testing all of the bulkheads surrounding each tank that is filled by working on the smooth side of that tank. That, in substance, is the entire matter.

Q. Now, Mr. Becker, I want to call to your specific attention the testimony of certain witnesses here, first that of Captain Dedrick, shown on page 21 of the transcript of Thursday, February 23, 1928:

(Testimony of A. L. Becker.)

"Q. Now, answer the question directly, what was done? After the collision on November 16, just exactly what was done to the tanks?

"A. What was done during the repairs to the collision damage?

"Q. Yes; what testing?

"A. There was no testing being made during the repairs to the collision damage; it couldn't be done, because we couldn't put any water in the tanks to test the bulkheads.

"Q. Your test was the filling of the tank with water, was it? A. Absolutely.

"Q. And where did you get the water?

"A. From the sea; from the bay. We pumped it with our own pumps into the tanks from the bay.

"Q. You pumped it into the tanks?

"A. Yes; sure.

"Q. Well, when was that done?

"A. Whenever it was required to test the bulkheads.

"Q. I say, when was it done with respect to these three tanks?

"A. It was done two or three times before the collision, and we would always find any leaks that were in the bulkheads and then we would have to let the water out again and then put it in again when that particular repair to that corner was made. After that was done and the leaks had been stopped, then we would

(Testimony of A. L. Becker.)

[183] have to pump the tank full again and try it again.

"Q. Will you state please, if you can, when these tanks had been pumped full of water previous to the accident?

"A. I can't tell you the day and hour those tanks were filled. It was done this way. Now, suppose we fill the tank to-day—

"Q. No; just a minute. Answer the question. I asked you how many times the tanks had been filled with water before the collision?

"A. I couldn't tell you that; it is impossible, but they had been filled.

"The COMMISSIONER.—Q. Can you tell us approximately the number of times?

"A. I don't know. Mr. Klein—he has charge of that. He can tell.

"Q. Well, never mind, then, as long as he is here to testify.

"A. I wasn't there to supervise every little bit of a job that was done on the bulkhead. I was there when the tank was filled and then we had to go around on the other side and look for leaks. If there was a leak on the other side, we had to take the water out and repair the leak and then put the water in again to see whether there were any other leaks. We did that half a dozen times or more.

"Mr. KENT.—Q. Then you will say this much, that the tanks had been filled one or more times prior to the accident?

(Testimony of A. L. Becker.)

"A. Absolutely, yes.

"Q. And then after the tank was filled, then you would proceed to see where the leak occurred and would repair it?

"A. And then let the water out again so we can repair it. We couldn't repair it with the water in. The water had to be let out again first. Then when that repair was made we had to pump it full again and try it again."

I also want to call your attention to Mr. Klein's testimony, beginning at page 46: [184]

"Q. Do you know what the plans were with regard to the reconstruction of the 'Lansing' and what they intended to do with her if there had been no collision; what the plans were before the collision?

"A. We intended to go to sea as soon as the forward tanks were finished. At that time we were working on the tanks to tighten up the bulkheads.

"Q. At the time of the collision?

"A. At the time of the collision. The other equipment was ready to run and we were only working on the tanks to have these bulkheads tight.

"Q. How long had you been working on the bulkheads tightening up the tanks and testing them, prior to the collision?

"A. About two weeks, if I remember right.

"Q. Why did it take so long?

"A. Well, it is an old ship and the construc-

(Testimony of A. L. Becker.)

tion of the bulkheads requires testing; you have to test the bulkheads to make them tight. You tighten up the bulkhead and then you have to test it. If you find any leaks you naturally have to let the water out of it and tighten it up again.

"Q. Isn't it possible, or wasn't it possible to locate all of your leaks on one test?

"A. Not very well, the way these bulkheads are constructed.

"Q. Why not?

"A. Well, by testing the bulkheads, you find one leak in one place and another one in another place, then you tighten up these leaks, rivet the seams, or whatever it is; but a seam is liable to open up further up or down in another place. Therefore, if you tighten up one place it is very likely, or it is possible that another place opens up; then you fill up the tank and test it again and naturally if you fail to discover that new leak you have to let all the water out again and then you have to tighten that new leak again. [185]

"Q. Now, why couldn't the work all have been done at the same time? I mean, why couldn't the work of tightening up and testing these bulkheads have been carried on during the time the collision repairs were being made?

"A. Well, when we were testing and tightening up the bulkheads, always we had to fill the tank with water. We had as much as two thou-

(Testimony of A. L. Becker.)

sand tons of water in there at times when we tested the bulkheads. We had to test the bulkheads from both sides. That naturally would lower the ship in the water and it would submerge the opening on the side of the ship which was caused through that collision. The plates were taken off there, and if we had filled the forward tanks the ship would have been lowered in the water and it would have filled up the boiler-room and engine-room with water and caused the ship to sink, naturally."

Now, then, referring you to the testimony of Mr. Biggins, of the Eureka Boiler Works, beginning at the bottom of page 61,—

"Q. After the work on the outside of the ship was completed by your men, was anything done about testing the tanks?

"A. Yes. Then we started again on the tanks. We were working on the tanks at the time of the collision, and then after the collision, of course, we didn't do anything or couldn't do anything with the tanks until the repairs were made on account of the collision, and after the repairs were made on the collision damage, then we started back to work again on the tanks, testing them, and making repairs, checking the leaks in the bulkheads."

Now, there is one other thing I want to call your attention to, and I take it there is no necessity of referring specifically to the testimony—we can if

(Testimony of A. L. Becker.)

Mr. Sawyer wants to—but the testimony was, as I recall it, that after the opening up of [186] the side of the vessel had been made, the closest part of the opening to the water was from 15 to 18 inches.

Mr. SAWYER.—I do not agree with you as to that. I would like you to refer to that testimony. I do not say you are wrong, but I would like you to refer to that.

Mr. KENT.—One place is on page 32, and it is the testimony of Mr. Martin Swanson, at the top of page 32:

> "Q. You mean there was a hole?
>
> "A. The lower part of the plate was pulled apart for a foot or fifteen inches above the water, where she was run into. That was taken out, that plate was taken out."

Now, there is another place where the same matter was gone into. This is still the testimony of Mr. Swanson; on cross-examination, page 37, he said, in answer to this question:

> "Q. Then your best judgment is that the tug had hit the 'Lansing' about four feet above the water-line, approximately?
>
> "A. Maybe a little less. I didn't measure it with a rule.
>
> "Q. But it was approximately four feet above the then water-line? A. Yes.
>
> "Q. And that the damage extended down to within about fifteen inches of the water?
>
> "A. Yes, I should judge."

(Testimony of A. L. Becker.)

Then there is another place I have not got.

Mr. SAWYER.—Your recollection of the testimony and mine is exactly the same, but the point I am making is the location of the damage might be fifteen or twenty inches from the water, but, as a matter of fact, there were several plates removed, and they did not say where.

Mr. KENT.—The testimony, on the contrary, shows that the plates were taken off four feet above.

Mr. SAWYER.—Show me that testimony. You have not read it yet. [187]

Mr. KENT.—I refer you now to page 10 of the testimony of Captain Dedrick:

"Q. Where was the damage?

"A. It was in the wake of the boiler-room, amidships, right opposite the boiler-room, amidships.

"Q. On the port side?

"A. On the port side.

"Q. What did the damage consist of?

"A. Well, it was dented plates, you know, causing a hole in the side.

"Q. How far above the water-line was that?

"A. I believe it was from fifteen to twenty inches."

Mr. SAWYER.—He is talking about the collision damage. He is not talking about the condition after the plates were removed. That is the reason I questioned your recollection of the record, because of this testimony that I introduced was on the loca-

(Testimony of Edward B. Egbert.)

tion of the damage, and not as to the number of plates that were taken off, or how high any plates projected above the water.

Mr. KENT.—This is on cross-examination by myself, on page 36, at the bottom of the page:

> "Q. And how high above the water were the plates dented?
>
> "A. Well, where the tug hit her, I should judge, was about four feet, but there was a gap, you know, in the plate, which let the water in, and that went down a good deal more. I couldn't say exactly, you know. When the plate was taken out I should judge it was about 50 inches above the water."

I think that is quite clear.

Mr. SAWYER.—I submit that what we are after is the fact.

Mr. KENT.—The witnesses have testified here, and I cannot see how it can be any plainer than that.

Mr. SAWYER.—Mr. Egbert was the surveyor in charge, and I would like to put him on. [188]

Mr. KENT.—Very well.

(Thereupon the witness was temporarily withdrawn.)

TESTIMONY OF EDWARD B. EGBERT, FOR LIBELANT (RECALLED).

EDWARD B. EGBERT, recalled for the libelant.

Mr. SAWYER.—Q. What is your business?

A. Consulting engineer, and marine surveyor, Bureau Veritas.

(Testimony of Edward B. Egbert.)

Q. You hold any license? A. Yes.

Q. What? A. First assistant engineer.

Q. How long have you been following the sea?

A. I have been twenty years in this business all together, the last five years as marine surveyor.

Q. As marine surveyor in San Francisco?

A. Yes.

Q. And prior to the last five years, what was your occupation?

A. Superintending engineer of the Robert Dollar Steamship Company.

Q. How long did you fill that berth?

A. Ten years.

Q. Port engineer, practically? A. Yes.

Q. Mr. Egbert, you had something to do, did you not, with the collision repairs, repairs of the collision damage on the "Lansing"? A. I did.

Q. At the time she was run into by the Santa Fe tug?

A. Yes, I was called upon to make a survey.

Q. State exactly just what you did, and what you found.

A. I found three shell plates on port side in way of after end of fire-room indented about four inches.

Q. You make a great many surveys in port, don't you? A. Yes.

Q. You have no independent recollection of this, except from your survey report?

A. No, not except from my survey report.

Q. You are refreshing your recollection from the survey report? A. Yes. [189]

(Testimony of Edward B. Egbert.)

Q. Continue.

A. Damage about 3 feet above light water-line. 5 single frames, 2 web frames in way of damage bent. Gusset connecting stringer and strong beam badly buckled. I recommended the following repairs: Three shell plates to be removed, faired and returned. Fair in place five single frames and two web frames. All frames, angle clips, reverse bars, or brackets in way of damage, to be feared or restored to their original condition. Gusset and stringer bars to be removed, faired, and returned. Any loose or defective rivets in way of damage to be replaced. After work has been completed, same to be tested and proven tight. All work to be given one coat of paint, same as original.

Q. Now, you also had something to do with the supervision of the reconstruction of the "Lansing," did you not?

A. I had to do with the classification of the ship for the Bureau Veritas.

Q. You kept a log, did you not? A. I did.

Q. Will you refresh your recollection from the log and tell us just what tanks had been tested at the time of this collision, and what remained yet to be done?

Mr. KENT.—Has this got anything to do with the question of the distance above the water-line?

Mr. SAWYER.—Yes, it has.

Mr. KENT.—I will reserve my objection to this line of testimony.

(Testimony of Edward B. Egbert.)

The COMMISSIONER.—I will let the testimony go in subject to the objection.

A. On September 23 the after peak-tank was tested and passed O. Y.

Mr. KENT.—Q. What year?

A. 1926. On October 12, 1926, [190] the following bulkheads were tested: The after end of No. 4. On October 7, 1926, the after end of No. 5; on October 12, the after end of No. 6.

Mr. SAWYER.—Q. That means both port and starboard, does it not?

A. Yes. On October 15, the after cofferdam. On October 15 all of the after tanks had been tested and found tight. There yet remained the port and starboard summer tank to be made tight.

Mr. KENT.—Q. What date was that?

A. October 15.

Mr. SAWYER.—Q. That is prior to the collision?

A. Yes.

Q. What was the date of the collision?

Mr. KENT.—The collision was November 16, at one A. M.

Mr. SAWYER.—Q. Now, had these summer tanks been tested at the time of the collision?

A. They had not.

Q. Can you draw a cross-section, a rough sketch, so as to show us where the summer tanks are—just a free-hand sketch?

Mr. KENT.—While he is at that, it seems to me I still do not get any connection between the dis-

(Testimony of Edward B. Egbert.)

tance of the hole above the water-line and the possible testing or lack of testing of these summer tanks.

Mr. SAWYER.—I am coming to it as fast as I can.

A. These are the summer tanks, marked in cross-section.

Q. What was the free-board after the removal of the plates for the making of the collision repairs—what was the height of the free-board above the water?

Mr. KENT.—I am going to object to that, because the witness has stated in his opening testimony that he had no independent recollection of the collision, or of the repairs, or any survey that he had made, other than what is contained in the survey, itself, and he was testifying refreshing his recollection from that memorandum. Now, an examination of [191] a copy of the survey which was handed me by Mr. Sawyer, dated November 22, 1926, as far as I have been able to gather from it, does not mention as to where or how much free-board there was when the hole was finally opened for repairs, and I object to the question on that ground.

Mr. SAWYER.—Just a minute. He was refreshing his recollection as to the nature of the damage, and what repairs he recommended. Now, I am going to ask him the point-blank question. Do you remember how far the water was below the top of the last steel plate that remained in place

(Testimony of Edward B. Egbert.)

after the removal of the plates for the making of the collision repairs?

Mr. KENT.—I would like to make an objection to that, and I would like to have the reporter read his statement at the opening of the testimony. If you will go back you will find that he stated that he had no independent recollection, other than that he gathered from his survey, which he was reading from.

(The record was here read by the reporter.)

The COMMISSIONER.—I remember that, and you can question him again if you want to bring out something different from that.

Mr. SAWYER.—Q. Have you any independent recollection, at all, of anything in connection with the collision damage to the "Lansing," other than what is contained in your report?

A. I have.

Q. Have you any independent recollection, at all, of the distance that existed from the water to the top of the last plate that was left in place after the three plates had been removed to repair the collision damage?

Mr. KENT.—Before you answer that, I would like to call your attention to the previous testimony of yours in which [192] you stated, which seemed to me referred to the entire transaction, that you had no independent recollection. I desire to call that to your attention before you give your answer.

A. Yes. I have a recollection of the repairs to

(Testimony of Edward B. Egbert.)

that vessel. When the plates were removed I crawled up on the staging on the inside of the vessel and looked at the plates, and looked outside through the hull of the ship, and at the water-line, and it was very close to the edge of the plate that was still on the ship; and it is my opinion—

Mr. SAWYER.—Just a minute, not your opinion; give us your best recollection of how close it was. "Very close" is indefinite.

A. It is my recollection that the water was about twelve inches from the edge of the plate. To measure that in inches is a very difficult thing, because of the condition of the bay at that time, and the waves dashing up; it does not take very much to make a 12-inch wave.

Q. That would vary from time to time?

A. That would vary from time to time, surely.

Q. According to the traffic conditions, and tidal conditions?

A. If there was a steam schooner passing, with the sternway, it would easily make twelve inches.

Q. In order to test a summer tank with a freeboard of 12 to 15 inches, such as you have just described, what would it be necessary to do?

A. To test the port summer tank it would be necessary to fill the port side of the two holds.

Q. Will you mark those so that we can get them?

Mr. KENT.—My recollection of the testimony was, that of Captain Biggins, and of the other gentleman that was produced here, that the testing of the tanks had to do with 1, 2, and 3, and there was no

(Testimony of Edward B. Egbert.)

question as to the summer tanks brought in [193] issue.

Mr. SAWYER.—That is perfectly true, but I did not know about the summer tanks until I talked to Mr. Egbert.

Mr. KENT.—The testimony of Mr. Biggins has no reference to any summer tanks; the work that he did, as I understand it, and I think the record shows it, was on tanks 1, 2, and 3, and, that being the case, that that was the work which you claim had to be done, and which caused the delay, I do not see that the question of his testing the summer tanks has anything to do with it.

Mr. SAWYER.—I submit the question.

The COMMISSIONER.—I will let the question be answered subject to the objection.

Mr. SAWYER.—Q. What would happen if you were testing the summer tanks, or any other tanks?

A. If you filled the port side of this hold with the amount of water that is in two of these tanks, because the summer tanks run from the two tanks, it would list the ship and fill the ship.

Q. I want you to distinguish between the effect of submergence by a level load placed evenly over the ship and the effect of a list.

A. There would not be any question about the fore-and-aft stability, but as to the traverse stability she would heel over and would be over on her beam end.

Q. Did you, as a surveyor in charge of the work, consider it practicable or safe to engage in testing

(Testimony of Edward B. Egbert.)

these tanks at any time that the collision repairs were being made?

A. I would not have permitted it.

Q. Why not? A. Because it is unsafe.

The COMMISSIONER.—Q. Were you in charge of the work?

A. I was in charge for the Bureau Veritas; that is the equivalent of the French Lloyd's; she is classed in the French Lloyd's. [194]

Q. The purpose of your inspection was to qualify her for her classification?

A. To qualify her for classification, yes.

The COMMISSIONER.—Proceed.

Mr. SAWYER.—Q. When did you finally class the ship?

A. She was finally classed November 30.

Q. What was necessary to give her classification in respect to the testing of the tanks?

A. All tanks had to be tested and proven tight.

Q. Was it possible to have classified this ship before the collision repairs were completed?

A. No.

Mr. SAWYER.—I will offer this diagram to explain Mr. Egbert's testimony, and ask that it be marked "Libelant's Exhibit Egbert." That is all.

(The diagram is marked "Libelant's Exhibit Egbert.")

Cross-examination.

Mr. KENT.—Q. Referring, now, Mr. Egbert, to your diagram, here, which is marked "Libelant's

(Testimony of Edward B. Egbert.)

Exhibit Egbert," and to the summer tanks, what are their dimensions, do you recall?

A. The summer tanks extend over two tanks, as I recall it, in referring to the sketch.

Q. That is, in length? A. In length.

Q. How about the width? A. Fifteen feet.

Q. And depth? A. About eight feet.

Q. And they would hold, when full, approximately how many barrels? That can be figured out; I withdraw that. You said that at the time of the collision, which was on November 16, these summer tanks had not been tested? A. Yes.

Q. Were they ever tested? A. Yes.

Q. Who did it? Did you? A. I did.

Q. When was that done?

A. It was done after the accident. [195]

Q. Could you give us the date?

A. I do not appear to have it.

Q. What is your best recollection about it?

A. It was previous to November 30. I have a record here that the certificate was delivered on November 30th.

Q. You made the test, yourself? A. Yes.

Q. What did the test of these summer tanks consist of? A. Filling this hold, here.

Q. I am directing your attention solely to the summer tanks.

A. Quite true. You see, the rivets come through like this, and the caulking side is in the summer tank; they have got a bar along here, also, and the

(Testimony of Edward B. Egbert.)

caulking side is on the inside, so we had to fill this hold in order to get a test upon the summer tank.

Mr. SAWYER.—Suppose you use some letters and describe the hold?

A. The hold A, B, C, D, E, F, H, had to be filled with water.

Mr. KENT.—Q. That hold was part of what was described in this diagram as tanks 1, 2, and 3?

A. Yes, and also in the after end. Then afterward, owing to the condition of the tank, it was necessary to empty the hold and fill this tank.

Q. Referring to the summer tank?

A. A, F, E, G, and examine it from the inside, on account of the caulking edges being on both sides.

Q. These summer tanks, as indicated on the sketch, run longitudinally up and down, or fore-and-aft? A. Yes.

Q. And they are situated on the extreme outboard side? A. On each side of the hatch.

Q. And the bottom and side of the summer tank forms a part of the top and side of the larger tank beneath: Is that it? [196]

A. No, they are absolutely separate.

Q. Well, I don't know whether I make myself clear; the two tanks are separate? A. Yes.

Q. But the lines E–F and E–A are apparently one partition, and from your sketch it appears to me that the bottom and side of the smaller tank forms the top side of the larger tank? A. Yes.

(Testimony of Edward B. Egbert.)

Q. When had you tested a tanker before, Mr. Egbert? A. For the Bureau Veritas?

Q. Yes. A. Any tanker?

Q. Yes. A. I don't recall now.

Q. Can you give us any idea as to your experience in making tests on these tanks? When did you run a similar test before without going into it in too great detail?

Mr. SAWYER.—You mean on any other ship?

Mr. KENT.—Yes.

A. The steamer "Argyle," in July of the same year.

Q. During that year, had you made any other test than on the "Lansing" and the "Argyle"?

A. No, not that I recall.

Q. And previous to that, the previous five years period in which you testified you were engaged in surveying, had you made tests on tanks before?

A. No, I was with the Dollar Company, and the Dollar Company had no tankers.

Q. Now, referring to your statement brought out on direct examination by Mr. Sawyer, that you climbed on a staging on the inside of the "Lansing" and observed the water-line, or the water from the inside of the hull looking out, you said, I think, in your opinion, as you recall it now, that the top of the plate was approximately a foot from the water. A. Yes.

Q. How did you arrive at that conclusion?

A. From my recollection of the water, looking

(Testimony of Edward B. Egbert.)

over it, looking over the edge [197] of the plate, it was very close.

Q. You did not measure it, did you?

A. Oh, no.

Q. You were inside looking down, were you?

A. Yes.

Q. That is the only way you have it in your mind now? A. Yes.

Q. Can you explain your statement in your original remark that you had no independent recollection, as I understood you, of the entire matter, other than your survey report?

A. Well, when Mr. Sawyer asked me that, I thought that he meant the detail of this survey report; I could not give it off by memory.

Q. Mr. Egbert, again referring to your diagram showing the summer tank, I think you said on your direct examination that the effect of filling these tanks was not to impart a pitch to the vessel, but a roll: Is that correct?

A. Yes, it would affect the transverse stability.

Q. It would affect the transverse stability, rather than fore-and-aft, if I express myself correctly?

A. Yes; of course, it would also affect the fore-and-aft stability if done in one place, but as the length of the ship is far greater, as compared with the beam, it would affect her transverse stability more than her fore-and-aft stability.

Q. And such general lowering of the water level line as might be induced by the placing of an additional weight in the ship?

(Testimony of Edward B. Egbert.)

A. Yes. Of course, if you place the weight aft on the port or starboard side, as the case might be, it would affect her fore-and-aft stability somewhat.

Q. But these summer tanks, as I understand it, were located rather more toward the center of the vessel than the extreme end, were they not?

A. I think I can give you that. The forward summer tanks extended the whole length of the No. 2 tank, and partly into No. 3 tank, and the after summer tank [198] extends the full length of the No. 6 tank and part way into No. 5. That is, that extends into this tank.

Mr. SAWYER.—By "this" the witness refers to tanks numbered 2 and 3 on Respondent's Exhibit "A."

A. Yes. Of course, when she was converted they cut out that after end of the other summer tank, for the machinery space which was utilized for cutting up the whale.

Mr. KENT.—Q. Are you quite sure as to your dimensions as to the depth of that tank?

A. No, I am not.

Q. Would you say it would be probably less than you gave it, or more?

A. I guessed at 17 feet for the hatch, and it is probably a little too large.

Mr. BECKER.—About 10 feet.

Mr. SAWYER.—Which, the hatch or the summer tank?

(Testimony of Edward B. Egbert.)

Mr. KENT.—The width of the summer tank. That is all.

Redirect Examination.

Mr. SAWYER.—Q. How long have you been surveyor for the Bureau Veritas?

A. Since 1925.

Q. What are the duties of a surveyor of the Bureau Veritas?

A. Classify vessels, to survey repairs, ascertain what damage is done, recommend repairs, and see that they are carried out.

Q. What is the Bureau Veritas, I mean what does it correspond to that people ordinarily know about?

A. It is the equivalent of the French Lloyd's, or the American Bureau; what Lloyd's is to the British, and the American Bureau is to the United States, the Bureau Veritas is to France, although American vessels may be classed in the Bureau Veritas, or British classed in the American Bureau.

Q. It is a classification society, is it not?

A. Yes.

Q. Maintained by the owners of vessels, is it not?

A. No, it is maintained by the insurance companies. [199]

Q. By the insurance companies? A. Yes.

Q. For the purpose of classifying vessels for insurance risks?

A. Yes, for reporting the truth of the vessel's condition.

(Testimony of Edward B. Egbert.)

Q. What is your territory, with regard to your jurisdiction of the Bureau Veritas?

A. We are Pacific Coast Agents, and our Pacific territory is San Francisco and surroundings.

Q. Do you have any idea of how many tankers there are classed in the Bureau Veritas? A. No.

Q. If it became necessary to make a classification for the Bureau Veritas of a tanker in this port, is there anyone else in this port who would do the work, than you? A. No.

Recross-examination.

Mr. KENT.—Q. These tests are made after the repairs are completed, are they not, for the purpose of determining for yourself as to whether they are satisfactory?

A. Yes.

Q. In other words, the repairs would be completed, and then—

A. (Interrupting.) They call me in to ascertain that they are done.

Q. You would run a test of your own quite independent of any test of theirs?

A. No, the shipyard, the owners would make the test and they would call me in to witness the test.

Q. But that would be a test made for your own purpose, and would not necessarily have anything to do with tests made by the construction people in making the repairs?

A. No; the construction people, when they are ready to make their tests, call me in, and I would

(Testimony of Edward B. Egbert.)

witness them and ascertain if there was any defective work, and recommend what repairs might be necessary to make the work good.

Q. In connection with these summer tanks, did you notice any new work on them?

A. There was no new work, a lot of old work, welding, etc. [200]

Q. These summer tanks were not injured in any way, but had been repaired?

A. They were not tight, no.

Mr. SAWYER.—Q. You mean they were not injured by the collision?

A. No, they are quite remote from the way of the damage.

Mr. KENT.—Q. Had there been any work done on these summer tanks, do you know, when you made your test on them?

A. On November 15, all work was completed, so far as the holds and bulkheads were concerned, and the work that remained to do at that time was the summer tanks, so far as testing was concerned.

Q. I want to get that clear, Mr. Egbert. Read that answer again.

(Last answer read by the reporter.)

A. That is right, although it was necessary to fill the holds just the same, yet, so far as I was concerned, the bulkhead had been passed.

Q. So far as you were concerned the bulkheads in tanks 1, 2, and 3 had been passed? A. Yes.

Q. And the only tests that had to be made were the tests on the summer tanks? A. Yes.

(Testimony of Edward B. Egbert.)

Q. That is, on the summer tanks over tanks 2 and 3 on both sides of the ship? A. Yes.

Further Redirect Examination.

Mr. SAWYER.—Q. You said, did you not, that it was impossible to test the summer tanks during the period during which the original repairs were going on? A. Absolutely.

Q. Was it possible to class the "Lansing," before the summer tanks were tested? A. No.

Q. What would happen if the "Lansing" had gone to sea without classification?

A. She would not have got insurance. [201]

Further Recross-examination.

Mr. KENT.—Q. Are you quite certain about that last statement? A. Absolutely.

Q. Is classification essential for insurance?

A. It was in that case.

Q. Why did you make this an exception, Mr. Egbert?

A. Because the insurance was placed in London, and she was taken out of Lloyd's classification, and there was a question in the mind of the London underwriters why she was taken out, and if she did not have any classification the British Underwriters would have all gotten off of her.

Q. You mean there was some question as to the seaworthiness of the vessel?

A. There was not any question as to the seaworthiness of the vessel, but there would have been

(Testimony of Edward B. Egbert.)

a very big question in the London underwriters' mind if she carried no classification.

Mr. KENT.—That is all.

Mr. SAWYER.—That closes our case.

TESTIMONY OF A. L. BECKER, FOR RESPONDENT (RESUMED).

A. L. BECKER, direct examination (resumed).

Mr. KENT.—Q. Mr. Becker, I will now refer you to Respondent's Exhibit "A," and to Respondant's Exhibit "B," and to "Libelant's Exhibit Egbert," and also call your attention again to the testimony which I read to you of the witnesses testifying at the previous hearing. What have you to say as to whether it was necessary or not necessary to empty tanks to fix each leak, as it has been found in your practice?

A. I think that is a very deliberate and slow process.

Q. Would you explain that more fully, please?

A. In testing tanks, the first process is to survey the tank, test all of the [202] rivets and caulking, examine all three-ply work, pump it, if necessary, before water is admitted to the tank.

Q. What does that mean, "pump it if necessary"?

A. That means force in putty through one sheet between the faying surfaces of the other sheet.

Mr. SAWYER.—Q. Do you say "putty"?

A. We call it putty. It is a graphite composi-

tion. This putty will travel along the seam of the plate, and will reveal leaks, if any. If leaks occur they are caulked to stop the escape of water. As soon as this is finished throughout the bulkhead to be tested, then water is admitted to the tank.

Mr. KENT.—Q. In other words, the entire tank surface, bottom, top, sides, and everything else, are gone over by an inspection and by this process that you have described, before any water is admitted to the tank. Is that it?

A. Yes.

Q. Is there any repair work carried on before water is admitted?

A. Yes, the idea being to eliminate, as far as possible, any leaks that might be found by water.

Q. Then, in addition to this putty, is there any structural work or iron work carried on in the tank?

A. If any loose rivets are found, they are cut out and redriven, and any caulking which looks inefficient is either recaulked, or if the bar is too far gone it is welded, the idea being to do the work on the tank when it is dry and eliminate the expense incident to filling it full of water.

Q. There was some testimony here as to the putting in of one rivet, that it would open up another. What have you to say as to the practice in that regard?

Mr. SAWYER.—I object to the general practice. We are dealing with a specific ship, and we are

(Testimony of A. L. Becker.)

dealing not with expert testimony, at all, but we are dealing with fact witnesses. [203]

Mr. KENT.—I beg your pardon. Those witnesses were put on to testify as to what happened to the tanks, and they hazarded a lot of expert opinions that in putting in one rivet it would open up another. I am asking Mr. Becker to give his evidence as to that, based on the knowledge he has from the repairs which he has made to many tankers, as to whether it is correct.

Mr. SAWYER.—In the first place, he has not testified he has made repairs to tankers.

Mr. KENT.—I think he did.

Mr. SAWYER.—I will object to it on the ground that no foundation is laid, and on the further ground that to compare one witness' testimony with another witness' testimony and make Mr. Becker the judge of the truth or falsity of the testimony is to invade the province of the Court, and is not within the province of an expert.

The COMMISSIONER.—Expert testimony, as you all know, is a question of one giving an opinion as against another.

Mr. SAWYER.—Based upon a hypothetical question.

The COMMISSIONER.—I will let the question be answered, subject to the objection.

Mr. KENT.—In order to satisfy you, we will assume that there is a rivet in a bulkhead of a tank in a tanker, and that that rivet is found to be improper or has to be removed; what effect would the

(Testimony of A. L. Becker.)

removal of that improper rivet, or the imperfect rivet, have on those immediately adjacent thereto?

A. It would probably loosen them, but we would be negligent in letting it go at that. The thing to do is to test the adjacent rivets, caulk the seals, and if the caulking is hard and solid, let it go. If it is not solid, we will pump it, as prescribed for all three-ply work, until we come to a point where the putty will not escape. [204]

Q. Would it be necessary to put in additional rivets on either side of the one which was found imperfect?

A. If those in there were found solid, with good heads and points, and were hardened up, and took the workmanship without breaking or cracking, heads flying off, we would leave them.

Q. Then you have got to the point where, in making repairs to a tank such as has been shown you here, all the work that you have described would be done before water is let in? A. Yes.

Q. Now, then, go ahead from there.

A. After this work has been done, then water would be put into the tank. As the water rises in the tank, the caulkers or tank testers would follow it up, and any leaks that could be obtained from the face side, providing it had a face side, would be taken out. By the time the water got to the top the bulkhead should be tight, unless there were stiffeners on either side, when it might be necessary to fill the opposite tank. That, however, is not found in modern tanks.

(Testimony of A. L. Becker.)

Q. I call your attention particularly to Respondent's Exhibit "B," which is your sketch of the type of construction, indicating the type of construction of the tanks 1, 2, and 3 shown in the "Lansing," which were explained, I think, by Mr. Egbert. Now, then, we will assume, for the purpose of this question, a hole in the side of the vessel which is at the maximum, or, rather, at the minimum, 12 inches above the water, with a possibility of its being 15 inches; will you state, basing your answer upon your knowledge of repairing tanks, and what you have done, yourself, in the past, as to how the testing of those tanks could have been carried on without endangering the vessel.

A. Referring to this sketch by Mr. Egbert, when tanks 2 and 3 were passed, the vertical bulkhead, and the horizontal bulkhead, or the top and the bottom of the summer tanks, took [205] the test along with the main tank, because they form a part of the top and side of the main tank. To finish testing the summer tank, it was necessary to fill the summer tank full of water, put a pressure on it, in order to get the deck and the shell in the way of the summer tank; this summer tank was 48 feet long, about, and about ten feet wide, and eight feet deep, which eight feet, I think, is excessive, but we will allow that. According to those dimensions, that tank would hold 110 tons of water; with the beam and width of this ship, there would be no objection to filling that tank full of water; it would roll the hole out of the water farther and facilitate the repairing of the hole. In the other tank, you

(Testimony of A. L. Becker.)

would have to wait until the last to repair, the summer tank on the side, where the hole was.

Mr. SAWYER.—Q. But you would have to wait for the one?

A. Yes.

Mr. KENT.—Q. In other words, the hole being on the port side, you could apply Mr. Egbert's test of applying water to both the outside and the inside, and handle the summer tank on the opposite side—the hole was on the port side—you could handle the starboard summer tank, could you not?

A. Yes, and if you put something up against that hole so that water would not slop into it, filling both of those summer tanks would bring the ship down seven inches, which would leave a free-board of five or six inches, depending on the free-board when the damage was done.

Q. Have you ever handled repairs to tankers at docks in San Francisco where you allowed a free-board of the kind you have just given?

A. No, not just exactly. I have handled three big jobs in San Francisco recently, the "Buck," the "Solano,"— [206] the "Solano" in Los Angeles, and the "Paul Shoup." In those ships the tanks were arranged substantially as outlined in my sketch.

Q. Respondent's Exhibit "B"?

A. Yes. If you will notice by following alternate tanks, you have one odd tank on either end. With all of the water out of the main tanks, I have filled the one port and the nine starboard indepently, without an undue listing of the vessel; in other

(Testimony of A. L. Becker.)

words, the stability of the tanks was such that she would still have sufficient stability with one of her main cargo tanks filled full and the opposite one empty.

Q. And the tanks that you filled were what type of tanks?

A. That was tank No. 9; corresponding to the odd one on this end of this ship there would be an odd one on the other end; and filling that odd tank did not roll the ship down beyond the danger point.

Q. Having in mind the lower tanks, and not the summer tanks on the "Lansing," as indicated on your diagram, and as described here, in size and dimensions, what procedure could you have followed in testing those tanks without endangering the vessel?

Mr. SAWYER.—Objected to as no foundation is laid. You have not given him any facts, at all, for a hypothetical question; you have not put any of the facts in evidence.

Mr. KENT.—I will submit the question.

The COMMISSIONER.—I will let the question be answered subject to the objection.

A. Read the question again.

Mr. KENT.—Read the question, Mr. Reporter.

(Last question repeated by the reporter.)

Q. Assuming that there was a hole in the side, with a free-board of twelve inches.

A. Mr. Egbert tells us that those tanks have already been tested, which is contrary to the testimony. [207]

(Testimony of A. L. Becker.)

Mr. SAWYER.—I move to strike the witness' conclusion as to what is contrary to the testimony.

The COMMISSIONER.—Just answer the question.

A. If we had those three forward tanks to test, with the hole on the port side, we could have put sufficient water in any one of those tanks—

Mr. KENT.—Q. (Interrupting.) By "those tanks," you mean what tanks?

A. The main tanks.

Q. The main tanks? A. Yes, 1, 2, or 3.

The COMMISSIONER.—Q. Anyone on the starboard side?

A. On the starboard side, to bring up the head of water perhaps one-half or two-thirds of one tank full because of the fact that this tank full of water all across the ship is 1000 tons, the free-board of fifteen inches on that basis is about 1200 tons; so filling the tank half or two-thirds full would roll the ship, which would compensate for submerging the ship to a certain extent, and enable the testing of the bounding bars and longitudinal bars, and the bottom work on all of those three tanks.

Mr. KENT.—Q. In your opinion, how much of the test work on these tanks could have been completed during the time that the repairs were going on, assuming the hole to be 12 or 15 inches above the water-line, and assuming also that they had not been tested before.

A. Both summer tanks could have been tested from the inside out to get the deck and shell side; the starboard main cargo tanks could have been all

(Testimony of A. L. Becker.)

tested for two-thirds of their depth without diminishing the free-board of the vessel, except for the summer tanks.

Q. Now, I direct your attention to the testimony of Mr. Biggins; Mr. Biggins testified as to the work done by him, and the method of doing it, from, I think, approximately, page 63 on. [208] If you desire, I can read Mr. Biggins' entire testimony, Mr. Sawyer, but I have summarized a statement as to the number of men working, and I will give him that if that is agreeable; and I want to ask him, after having called his attention to the testimony and read it all, as to whether he considers the work was carried on in a proper and workmanlike way. Of course, I can read him all of the testimony if you want me to.

Mr. SAWYER.—It is your case.

Mr. KENT.—Very well.

Mr. SAWYER.—I am not insisting that you read him the entire testimony.

Mr. KENT.—I feel that it should be called to his attention specifically, and unless you are willing to stipulate it has been so done, I will read it.

Mr. SAWYER.—Have you read Mr. Biggins' testimony?

A. Yes.

Q. And are familiar with it? A. Yes.

Mr. SAWYER.—All right, go ahead.

Mr. KENT.—Q. Now, having in mind Mr. Biggins' testimony as to the work and the number of men put on the job, and the method of handling it, what have you to say as to whether or not the work

(Testimony of A. L. Becker.)

was handled, basing your judgment upon your experience, with due diligence, and without loss of time?

Mr. SAWYER.—I object to that as immaterial, irrelevant, and incompetent. The fact remains that we were delayed here six days by collision repairs. Those six days were lost. This witness has already testified that all of the work could not have been done during collision repairs, so that if any part of it remained to be done after the collision repairs we have been retained the six days.

Mr. KENT.—The answer to that, it seems to me, is where a vessel is held up and the respondent is being charged with the [209] time that that vessel is held up, it can only be charged with such time as would be proper if due diligence had been applied to the handling of the repair work. We are not charged, certainly, with the actions, not necessarily, of this claimant, here, but the actions which might be considered as a waste of time or negligence on the part of the people making the repairs.

Mr. SAWYER.—We are not asking for any more than those six days' detention that we were held up during the collision repairs.

Mr. KENT.—It is our claim that a portion of that six days could have been saved had the work been handled in a different way.

Mr. SAWYER.—We are asking for that six days' delay. I think under the admitted testimony our repairs could not have been completed in that period of time.

The COMMISSIONER.—The respondent's contention is that the work should have been com-

(Testimony of A. L. Becker.)

pleted in a shorter time, that these tanks could have been tested during the time the repairs were being made; this witness, as I understand it, is called as an expert, as a man of experience in connection with such work as was done on this vessel at that time, and I will permit the question to be answered, subject to the objection.

Mr. SAWYER.—I don't know whether I have to note an exception.

The COMMISSIONER.—Let it be understood that you do note an exception.

Mr. KENT.—We will be glad to stipulate that exceptions may be considered noted to every adverse ruling on either side.

Mr. SAWYER.—Yes.

Mr. KENT.—Read the question.

(Last question repeated by the reporter.)

A. As described previously in the method of testing tanks, by [210] getting the tank ready for a test before the water is put in, that process saves the emptying and filling of tanks. When the tank is ready the water is usually put to the top and put under a head, and all leaks marked, if found, and then the tank is withdrawn and those leaks are repaired, and one filling of a tank for a test, especially if it is a smooth side, is sufficient for the testing of that tank, provided the proper workmanship has been done before the water is put in the tank. That being my practice, and my experience, it appears to me that Mr. Biggins' time, as stated in there, is extraordinary for accomplishing the purpose that he accomplished.

(Testimony of A. L. Becker.)

Q. This contract, as testified to by Captain Dedrick, was a cost and material contract. Is that customary in handling jobs of this character?

Mr. SAWYER.—Objected to, unless it be shown that the witness knows and has had experience. He has only testified to his own practice.

Mr. KENT.—Q. Mr. Becker, in handling the jobs that I think you testified to on direct examination, did you have anything to do with the contracts?

A. I wrote the contract, drew the specification, and supervised the work.

Q. In each and every instance?

A. In each and every instance.

Q. And in those cases, is it customary or not customary to let a contract for repair work where time is of the essence on a cost and material basis?

A. Yes, but usually there is a nonperformance penalty attached to the contract.

Mr. KENT.—I think that is all.

Cross-examination.

Mr. SAWYER.—Q. Mr. Becker, I judge from your testimony that after you have done this preliminary work, consisting of examination and putty pumping, that when you fill the tank with [211] water and put it under a head, you never find any leaks?

A. No, I did not say that.

Q. That is not the fact, is it?

A. I did not say that.

Q. Please answer my question. That is not the fact, is it? You do find leaks, don't you?

(Testimony of A. L. Becker.)

A. You might find leaks.

Q. You do frequently find leaks? A. Yes.

Q. Then you have to remove the water don't you?

A. No, absolutely not.

Q. Just a minute, please; let me finish my question. You then have to remove the water, and on occasions you have to go and do what you call the preliminary work over again, don't you?

A. I qualified my statement by saying provided it had a smooth bulkhead.

Q. Please answer my question.

A. I want to be interpreted in the way I have stated. I have told you the truth, and I do not want you to interpret it in some other way than I have stated.

The COMMISSIONER.—Just answer the question that Mr. Sawyer has asked you, Mr. Becker.

Mr. SAWYER.—I am trying to be fair with you, but one would gather, at least I did, from your testimony, that when this preliminary work has been done that you would have to only fill the tank with water once: Isn't that the idea you meant to convey?

A. Ordinarily, yes.

Q. Have you ever had to fill them more than once?

A. Yes.

Q. You usually have to fill them more than once?

A. No.

Q. Very frequently?

A. Very seldom fill them more than once. I tested out all eighteen tanks on those ships men-

(Testimony of A. L. Becker.)

tioned, and there was not one tank filled the second time.

Q. Then what did you mean by saying that all of the leaks are marked off if found? Sometimes you don't find the leaks, do you? [212]

A. I probably should have said "as they are found."

Q. You said, "If found." A. "If found."

Q. Because I noted it particularly. A. Yes.

Q. It is not unusual, is it, to overlook leaks?

A. Yes, it would be quite unusual.

Q. Does it ever happen?

A. Yes, to give you the benefit of the doubt, but I would not flow the tank down to get the leak, positively not.

Q. What would you do? A. Caulk it.

Q. This testing that you have done, has been on what class of vessels? A. Tankers.

Q. How old were they?

A. Well, the oldest one was built about 1908, the "Bradford."

Q. When had she last been overhauled?

A. When she went through her periodic classification.

Q. She had been in service?

A. No, she had been laid up for about one year.

Q. It is true, as a matter of fact, is it not, that in your oil tankers it does not make a particle of difference whether oil leaks from one tank into another oil-tank, does it?

A. Yes, it does. That is a misconception.

(Testimony of A. L. Becker.)

Q. What is the fact?

A. You should not let the center line leak, because if you did you would destroy the stability of your ship.

Q. How about the transverse bulkhead?

A. A small leak would not materially affect it.

Q. Precisely, and it would be entirely different if you had whale oil in one and water in another, wouldn't it? A. Yes.

Q. Your oil would be contaminated, and your water would be contaminated, too, would it not, so you would have to use a great deal more care in order to get a rigid separation between tanks than you would in the case of a vessel carrying a [213] homogeneous commodity such as oil: Isn't that true?

A. No, it is not true, because you are assuming a ship is not built to classification. You cannot carry water in one side of a tank and oil in the other without a cofferdam between.

Q. I am merely asking you this question, whether, as a matter of fact, in a ship like the "Lansing," designed for the purpose for which the "Lansing" was designed, a rigid separation between tanks is not more essential than it is in carting fuel oil up and down the coast in fuel tanks?

Mr. KENT.—I submit the question has been answered. The witness has stated that it assumes the fact that the vessel was not in the proper classification, and you would have to have a cofferdam between.

(Testimony of A. L. Becker.)

Mr. SAWYER.—I have asked that question, and I will ask that it be answered.

The COMMISSIONER.—Let it be answered.

A. What is the question?

Mr. SAWYER.—Q. Read it.

(Last question repeated by the reporter.)

A. Yes, it is.

Q. And the character of the test would be much more rigid, would it not?

A. If the Bureau Veritas stood by their guns, they would not permit you to do it.

Q. That is not responsive to the question, and I move to strike it out. As a matter of fact, the test would be much more rigid, would it not?

A. No, because the test in an oil-tank is a tight test, it is not a leak test.

Q. As a matter of fact, your oil tankers do leak between bulkheads, don't they?

A. Very little, a good oil tanker very little, when properly tested.

Q. They are not all good tankers, there are lots of them going [214] up and down the coast leaking oil from compartment to compartment: Isn't that true?

A. You would not find any of the Union or Associated tankers.

Q. No, none of those under your jurisdiction, but there are a lot of oil tankers that are going up and down the coast that leak oil from compartment to compartment: Isn't that true?

(Testimony of A. L. Becker.)

A. I suppose it is: In fact, if I had one and was going to carry nothing but crude oil I would not be so fussy about it; but I surely would not carry water on one side and oil on the other without a coffer-dam.

Q. Has it ever happened in your experience that this so-called preliminary work has had to be done over after water has been admitted to the tank?

A. That depends on who did it.

Q. But it does happen, doesn't it?

A. I have never seen it happen, never with me.

Q. Not with you?

A. No, I have never seen it happen, except, Mr. Sawyer, as I have qualified it time and time, and again, if we have a combination of stiffeners on either side of the bulkhead, which might be the case in one or two bulkheads in this boat—

Q. In the "Lansing"? A. Yes.

Q. If you had that situation, what?

A. Then you would have to let out that tank and fill the other side to get the points of the rivets on the other side.

Q. I think you have already testified, haven't you, that in repairing one rivet it might loosen others?

A. Yes, but that is your business, when you loosen the other one, to fix it before you put the water in.

Q. That may be conceded, but at the same time that happens, doesn't it?

A. It does, if it is a poorly riveted ship.

Q. Do you know anything about the character of riveting in the [215] "Lansing"? A. I do not.

(Testimony of A. L. Becker.)

Q. Did you ever have to do with an oil tanker that was 39 years old?

A. It is not 39 years since she has been converted. The bulkheads were put in when she was converted.

Q. As a matter of fact, the "Lansing" is the oldest oil-tanker on the coast, is she not?

A. I guess there is one nearly as bad, the "Brilliant," of the Richfield Oil Company, the bottom is almost through, and we never lowered the water in any one tank after we filled it. Of course, we had a lot of work to do before we filled them.

Q. Were they smooth surface? A. Yes.

Q. All smooth surface? A. Yes.

Q. That makes quite a difference?

A. Yes. That was one of the first oil tankers designed. However, not to depreciate my friend ship, she has got a new bottom.

Q. When you were talking about the water-line what you were getting at was this, that a certain number of tons, 32, I think you said, would lower the vessel one inch in the water.

A. Yes, tons per inch.

Q. That water-line that you are talking about is what is known as water-plane, is it not?

A. Water-plane.

Q. And that weight distributed evenly over the ship would depress the water-plane one inch: Is that it—32 tons would depress it one inch?

A. Yes, but to get that clear, so that there won't be any misunderstanding, it might go down two

(Testimony of A. L. Becker.)

inches by the bow and stay stationary at the stern; that would be a mean of one inch.

Q. I understand that, but, at the same time, what you are talking about is a theoretical depression of the water-plane by a load evenly distributed over the ship? A. Yes.

Q. That is what you are talking about?

A. Yes, it is a factor [216] with all ships, all of the captains know that—

Q. (Interrupting.) Just a minute—that is quite a different matter from listing a ship with a load confined to a small area of the ship, is it not?

A. No, a ton is a ton, wherever you put it; it will bring down your ship per inch, whatever your tons per inch are.

Q. Suppose on the port side you put 32 tons per inch, you would list the ship instead of depressing the water-plane evenly, wouldn't you?

A. No, you would increase the volume of displacement according to the tons that you put on top, you would also increase the volume of displacement, and then you would incline the center line of the ship.

Q. Perhaps we are talking at cross purposes. Assuming that a ship is loaded on the port side, only, to the extent of 32 tons per inch.

A. You mean over the entire water-plane?

Q. No, I said on the port side, only.

A. I could answer it if you ask your question intelligently.

Q. If I am lacking in intelligence—

(Testimony of A. L. Becker.)

A. I should not have said that.

Q. Let me struggle with my questions and you answer them. If you took a ship and loaded only the cargo compartments on one side, you do not depress the water-plane of that ship in accordance with your formula, do you?

A. Absolutely you do; you cannot put a pound on the ship anywhere but what you have the complement of that pound in volume of water displacement.

Q. But at the same time you list your ship, don't you? A. Yes.

Q. When you depress the water-plane you do not list your ship, do you? A. Yes.

Q. You mean to say—

The COMMISSIONER.—The witness, I think, has made it pretty clear to my mind, what his testimony is as to the listing. [217] Of course, if you put 32 tons on the starboard side, you list your vessel toward starboard, but the displacement would be exactly the same.

Mr. SAWYER.—The displacement would be exactly the same, I understand, but your deck would not be parallel with the surface of the water, would it? A. Not if she is listed.

Q. Whereas, if you depress the water-plane, push the water-plane down one inch, your deck would still be parallel with the surface of the water, wouldn't it?

A. If you push it uniformly down?

Q. Yes. A. Yes.

(Testimony of A. L. Becker.)

Q. So all of this formula that you are talking about, of 32 tons per inch to depress the water-plane one inch, you mean depress it evenly, don't you?

A. No, that is not understood that way by anybody. It means this, that if I put 32 tons on a ship anywhere that I have increased the volume of the ship in the water 32 tons, measured by the water displacement.

The COMMISSIONER.—But not all portions of the ship are the same under water?

A. No.

Q. If the ship listed to starboard, the depression of it would be greater under water than on the port side?

A. Yes, but the sum total of the whole thing would be 32 tons.

Mr. SAWYER.—Q. I do not think any of the experts disagree that if you load a ship on one side you list her.

A. No.

Q. If you test the tanks on one side you list the ship, don't you? A. Yes.

Q. Have you ever tested tanks on a ship where there was an open gap, three plates removed, so as so give you a 15-inch free-board at a dock?

A. No, but there could be no objection to it.

Q. But I say, you have never done it, have you?

A. Yes.

Q. Where?

A. In the Sun Shipbuilding Yard, at Chester, Pennsylvania. [218] The incident was this, we

(Testimony of A. L. Becker.)

had a barge that we were bringing out for the Richfield Oil Company, and she had a starboard plate off just above the water-line, and we actually filled the port tank and threw her over.

Q. Which side was it on?

A. The starboard side; the port side was next to the dock. We actually filled the port tank, and drew it out of the water far enough to take the plate off.

Q. But you never filled the tank on the same side where the plate was removed, did you?

A. No, I did not testify to that.

Q. But I mean you never have?

A. On the same side?

Q. Yes.

A. It depends on the height of the plate above the water.

Q. I gave you the height, fifteen inches. You never have done that, have you?

A. No. You might go a hundred years and not get a free-board fifteen inches with a plate off. That would be an extraordinary situation.

Q. It is an extraordinary situation, and one that requires great care in the handling of it.

A. No more than sixteen.

Q. Fifteen or sixteen is a matter of degree, but it requires great care in the handling of it?

A. Yes.

Q. Where you have traffic conditions, passing steamers, tidal conditions, wind conditions, unless you are exceedingly careful to keep that ship on an

(Testimony of A. L. Becker.)

even keel, you have a good chance of flooding her, haven't you?

A. No, you would have less chance if you rolled a ship up and got her further out of the water.

Q. I am talking about rolling the ship down.

A. I would not.

Q. You would not do that, would you? A. No.

Q. That would be very dangerous, would it not?

A. Yes.

The COMMISSIONER.—How about bringing it down within an inch of the water-line?

A. I would not do that.

Q. Two inches? A. No. [219]

Q. Three inches?

A. Six inches. You have got to have three inches anyway, because that plate that you see there contains a double row of rivets, and that is about three inches from the edge of the plate, the inner row of rivets, and I would not want to put that row of rivets down.

Q. You would want three inches above that, making it six inches? A. Yes.

Mr. SAWYER.—Q. As a matter of fact, you would not want to roll a ship on the side where the opening was only fifteen inches from the water-line?

A. No.

Q. As a matter of fact, if the collision repairs had not been made at the dock and they had to take her over and dry-dock her to make the repairs, the collision repairs would have been much more expensive, wouldn't they?

(Testimony of A. L. Becker.)

A. That depends upon the way you received your bid.

Q. I will put the question to you this way: Assuming that the collision repairs required six days, would it have cost more to make those repairs at a shipyard and dry-dock the ship and have her on the dry-dock those six days than to have made the repairs in the water?

A. That cannot be determined unless bids were taken. Were they?

Q. The cost of dry-docking, itself, would be more would it not?

A. I have operated dry-docks, and if I wanted a job very bad, and I did not have anything to do for the dry-dock, I do not think I would figure very much on the value of that.

Q. It would be one of the elements entering into the cost and determining the amount of the bid, would it not?

A. That is entirely with the man submitting the bid, and that is why I asked if bids were taken, published bids.

Q. Assume that published bids were taken.

A. Yes.

Q. Wouldn't the cost of making the repairs in the shipyard, putting [220] the vessel on the dry-dock, and keeping her there for six days, be more than making the repairs afloat?

A. That question assumes a knowledge of the efficiency of one shipyard as against another.

(Testimony of A. L. Becker.)

Q. Generally speaking, which do you think would be the cheaper way to make the repairs?

A. Well, that—

Q. You don't want to answer that question, do you?

A. I don't want to answer it, for this reason: I could take that ship on a dry-dock where they have air connections, hose, gas, and facilities within six feet of the damage, where they have trestles, tools of all kinds to handle it expeditiously, and the possibilities are that the work would be done in one-half or one-third the time that it could be done working off of a float, where you have to cart the tools from some shop up in town down, and if you want another tool you have got to run up town and get it and come back; in other words, in one place you are doing it with an exceedingly efficient organization, with your machinery and equipment right at hand, and the other place you are doing it under adverse conditions. Now, then, the labor under those adverse conditions may have offset the additional cost of the dry-docking to one-half of the time, because I am certain that any one of the shipyards, having three plates to go off and on and faired, and the corresponding framework to do, would do that work in three days easily, probably two days and a half.

Q. As a matter of fact, if the work had been done at a shipyard and the ship had been dry-docked, you would have the towage to consider, wouldn't you, as an additional cost? A. Well—

(Testimony of A. L. Becker.)

Q. Will you please answer my question?

A. No, you would not.

Q. Why not?

A. Let me explain why you would not.

Q. That is all right, but I want an answer.

A. If Mr. Egbert, or whoever is the superintending engineer, or the surveyor draws specifications and tells them that the ship [221] is at a certain pier, to take her and bring her back to that pier, or deliver her to there, and submit a price for doing the work according to the specifications, you would get Moore's, the General Engineering, Bethlehem, United Engineering—you would probably get eight or ten bids on that thing, and among some of them, depending upon whether some shipyard does not need their dry-dock very badly, you will get a pretty low bid on it.

Q. Assume that in this case bids were received from the Eureka Boiler Works, $2645 for seven days, General Engineering Company $2980 for eight days, Bethlehem for $3064 for eight days, Hanlon's $2871, nine days, Moore, $2896, nine days, United Engineering, $2845, eight days; in view of the fact that those bids were received—assuming that that is a fact, will you tell me whether or not that was done at the cheapest possible price?

Mr. KENT.—I object to that, because it does not state what the specifications are on those bids.

Mr. SAWYER.—I have got the specifications, if you want me to read them into the record.

Mr. KENT.—I think, if the question is material, we ought to have the whole thing.

(Testimony of A. L. Becker.)

Mr. SAWYER.—These are the specifications. We will assume they are.

"Specifications of Repairs to the Steamer 'Lansing.'

"Bids will be received by Captain F. Dedrick, of the California Sea Products Company, on board the above steamer at 3:00 P. M., Tuesday, November 16, 1926, covering repairs to the shell plating on the port side in the way of the after boiler room.

"The contractor will state in his bis bid the number of calendar days it will require to complete the work hereunder.

"The California Sea Products Company reserve the right to reject any or all bids without statement of cause. [222]

"The contractor shall complete the work to the satisfaction of the United States Steamboat Inspectors and the Bureau Veritas Classification Surveyor.

"The contractor shall give a lump sum price which will include all charges for labor, material, overtime, barge hire, crane hire, cartage and any other charges of whatsoever nature.

"The contractor shall protect the California Sea Products Company from all liens or suits for injury or accident to employees.

"Should the contractor require in the course of the work the removal or shifting of any part of the vessel or its fittings, same shall be done by him and all such removals shall be subsequently replaced and any damage resulting therefrom to be made good by the contractor.

(Testimony of A. L. Becker.)

"Remove, fair and return three shell plates on port side abreast the fire room.

"Fair in place five single frames and two web frames. All frames, angle clips, reverse bars, or brackets in the way of damaged plates, to be faired or restored to their original condition.

"Stringer clips, and gusset to strong beam to be removed, faired and returned.

"Any loose or defective rivets in way of damage to be replaced.

"After work has been completed, same to be hose tested and proven tight.

"All work to be given one coat of paint same as original.

"CALIFORNIA SEA PRODUCTS COMPANY."

In view of the bids that I have given you, will you please tell us whether or not, in your opinion, this was done in the cheapest way possible?

A. The owner is not protected in the [223] specifications. There is nothing there to show that the owner is in a hurry for that ship, there is no penalty or liquidated damages for overtime. They specify a time in there but they are not bound for any damages. That does not protect the owner at all. That assumes the owner does not care anything about the time required.

Q. In view of the bids I have given you, and the specifications, will you tell me whether or not that was done in the cheapest way?

A. Did they take the lowest bid?

(Testimony of A. L. Becker.)

Q. Yes.

A. That would be all right, except for the fact that he does not know now when he is going to get his ship.

Q. You bear in mind, don't you, that each bid specified the number of days to do the work?

A. Yes, but there are no liquidated damages in the contract.

Q. Is it your opinion that liquidated damages are essential to the validity of a contract?

A. It is my opinion that if you have a clause covering liquidated damages you would get your boat at the time specified, or damages from them for the delay.

Q. Now, as a matter of fact, in the summer tanks there are not smooth sides, at all; rivets are on both sides of the tank in the "Lansing," isn't that the fact?

A. I don't know how she is converted. Usually in a summer tank the center line bulkhead or the inboard bulkhead is smooth inside, and the outboard bulkhead is rough, the frames of the ship are there, but the outside of it are smooth.

Q. Now, as a matter of fact, if at that time the summer tanks had been leaking into the other tanks, you could not make the test in the way you have suggested, could you?

A. You mean after filling the summer tanks?

Q. Yes.

A. You would then have the main tank empty.

Q. And if there were leaks there into the main

(Testimony of A. L. Becker.)

tank, that would [224] not be sufficient, would it?

A. You would have found the leak when you headed up your main tank; if it was a reverse leak that you had to catch from this side, you would have found the leak in the summer tank at the time you tested the main tank, and if it was a rivet or something that you had to cut out from the other side, then, of course you would repair that before you ever put water in the summer tank.

Q. You would have to do that first, wouldn't you?

A. Yes, but you would do it when you blew down the main tank; that would be before you started the test on the summer tank.

Q. But it all comes down to this, doesn't it?

Mr. Egbert testified in his opinion that it was unsafe to test the summer tank on the same side as the hole was, that is, on the port side.

A. Well, I don't want to dispute Mr. Egbert. He told you what he had done.

Q. I understand that, but I mean that was his opinion, it was unsafe.

A. That was not the business of the American Bureau, or the Bureau Veritas; that was a matter of the shipyard, because you provide in your specifications that the shipbuilders, or the repair man will be responsible for the safety of the ship. You cannot interfere with his contract, that is up to him.

Q. I wish you would not argue with me. I wish you would answer the question.

(Testimony of A. L. Becker.)

A. I am pointing out it is not a matter of business of the Bureau Veritas to check the inclination of the ship.

Q. I am not asking you that question, at all.

A. I simply say that on a big ship we could put in one full tank of water on the port or starboard side, and—

Q. Just a minute.

Mr. KENT.—You are referring to the "Lansing," now, are you not?

A. No.

Mr. SAWYER.—He says on a big ship; that is why I interrupted [225] him, because I did not think it was responsive to my inquiry. We are dealing with the "Lansing."

Mr. KENT.—Talk about the "Lansing."

Mr. SAWYER.—Q. I want to ask you this question: In your opinion, was it a safe thing to test these summer tanks on the port side with that hole open there?

A. On the port side, with the hole?

Q. Yes.

A. No, you would roll it down.

Q. You would roll it down, wouldn't you?

A. Yes.

Q. And it was not a safe thing to do, was it?

A. No, but it was absolutely safe on the starboard side.

Q. You could not test the port summer tank and complete your test until those repairs were completed?

(Testimony of A. L. Becker.)

A. I think I have covered that in my statement.

Q. This is cross-examination. Please answer my question. A. Yes, we could do it.

Q. On the port side?

A. Yes, by filling the starboard too.

Q. Have you ever been a classification surveyor?

A. I am a surveyor for the American Bureau of Shipping.

Q. You are a surveyor for the American Bureau of Shipping? A. Yes, I am a recorded surveyor.

Q. You mean by that that you pass upon the classification for the American Bureau of Shipping?

A. I can any time that the chief surveyor asks me to, go out; I am authorized to do it.

Q. How recently have you done it?

A. I have been appointed for about six months.

Q. You have been appointed for about six months? A. Yes.

Q. How many surveys have you made in that time? A. For them?

Q. Yes. A. None.

Q. Prior to your appointment, had you ever served as a surveyor? A. Yes. [226]

Q. For whom? A. Independent surveyor.

Q. Have you ever surveyed as a surveyor for any classification society? A. For Lloyd's.

Q. On special work, you mean? A. Yes.

Q. Or general? A. Special work.

Q. What kind of work?

A. Damage, hull damage, in fact, when Captain

(Testimony of A. L. Becker.)

Kennedy was Lloyd's special agent here, or Lloyd's agent, I was doing a lot of work for him.

Q. Do you wish the marine fraternity to understand from your testimony that you, yourself, would have recommended the testing of the summer tanks on the port side of this vessel, the "Lansing," before the collision damage was repaired?

A. Well,—

Q. Please answer my question.

A. I have got to qualify it before I answer it.

Q. Answer it and then qualify it. A. Yes.

Q. You would take the responsibility for it?

A. Yes. Now, I want to qualify it. You have three plates to rivet up on that shell; there is nothing to prevent you driving the bottom seam first, and the vertical seams and longitudinal seam. If you drive that longitudinal seam you have got three feet plus what you had before for free-board, and your work isn't over half done, because, as you recall, with one plate out of the bottom and two above it, if you drive the longitudinal seam on the bottom and the vertical seam of that same plate, then you have approximately three feet added to the free-board, which you had before, and the work is still two-thirds to the finish, that is, if there was any anxiety to get the thing done.

Q. Do I understand you to criticise Mr. Egbert's judgment?

A. No, I am not criticising Mr. Egbert's judgment. I am telling you what I would do if I were in a hurry for that job.

(Testimony of A. L. Becker.)

Q. You would take the chance? [227]

Mr. KENT.—I object to that as assuming that there was a chance.

The COMMISSIONER.—The witness is able to take care of himself. This final test of the water, do they make that test the second time, or is one test sufficient?

A. When you once get it tight under water that finishes it.

Q. I mean you frequently have to put in water the second time?

A. No, except in an unusual case, where somebody has slipped up and has overlooked something that should have been done; except, Mr. Krull, I want to state, if you have stiffeners on either side of the bulkhead, for instance, if you have vertical stiffeners and horizontal on that size, which is not good practice, but sometimes you do find a ship built that way, then it is necessary to fill the tank on this side of the bulkhead and let the water down, and also fill it on the other side, and it may still be necessary to fill this again.

Mr. SAWYER.—Q. Mr. Becker, if you assume that it was necessary at any time during the collision repairs to fill the main tank, here, that I am indicating by the letters A, E, F, D, B,—if it was necessary to fill that tank with water during collision repairs and that tank alone, for the purpose of testing the character of the top or bottom, and the sides of the summer tanks, wouldn't the filling

(Testimony of A. L. Becker.)

of that tank list your ship to a dangerous angle if it was done on the port side?

A. On the port side, that is the side where the hole was?

Q. Yes. A. You could not do that.

Q. You could not do that, at all, could you?

A. No, not on the port side. You could on the starboard side.

Q. You could on the starboard side, but you could not on the port? A. No.

Q. If it was necessary to fill that tank that I have described [228] with water for the purpose of determining the condition of the bottom and sides of the summer tanks, then, as a matter of fact, you could not test the summer tank, at all, could you, on the port side, until these collision repairs were completed?

A. Not unless this had been done.

Q. The testimony is that it had not been done.

A. No. The thing to do was if you had this work to do, you had about six feet of free-board that you gain there by a little bit of work, closing up that bottom plate, there, and—

Q. But you would list your ship with a hole in the side?

A. I could list it until after I got this first plate on. That is about a three-foot-six plate, is it not?

Mr. EGBERT.—36 inches.

A. That gives you plenty of free-board.

Mr. SAWYER.—Q. You are assuming, are you not, in answer to all of these questions, that the

(Testimony of A. L. Becker.)

"Lansing" was one of the very first converted ships on this coast?

A. Yes, I know that.

Q. You are also assuming, are you not, that the stiffeners were on one side, and vertical and horizontal on the other?

A. On the bulkheads, yes; that is on the new work I would not think they would be, because nobody would do it that way if they had the job of making it tight afterward.

Q. Which assumption are you making with regard to the "Lansing"?

A. You must remember I predicate the whole thing on this sketch.

Q. If that sketch is wrong your theory is wrong?

A. No, I have qualified it for stiffeners for either side, saying that if one filling isn't sufficient that it might be necessary to fill a second time and go over on the other side.

Mr. KENT.—Your statement in regard to that sketch was made on the assumption that Mr. Egbert stated it was correct?

A. Yes. My statement was based assuming that we put that up [229] first, you know, and then, in addition to that, I qualified it by calling attention to the fact that if it did have stiffeners on both sides the work involved was more.

Mr. SAWYER.—You testified both ways.

A. Yes.

Q. To hit either assumption. A. Yes.

Mr. SAWYER.—I think that is all.

(Testimony of A. L. Becker.)

Mr. KENT.—I don't know whether the various sketches referred to have been formally offered in evidence, but in order to avoid any question I would like to offer the sketch of the SS. "Lansing" as Respondent's Exhibit "A," the pencil sketch made by Mr. Becker as Respondent's Exhibit "B," and I ask that they be so marked and offered in evidence. I presume Mr. Sawyer desires to make a like offer of "Respondent's Exhibit Egbert."

Mr. SAWYER.—Yes.

The COMMISSIONER.—About how long does it take to make this water test that you have been testifying to?

A. That is an indefinite proposition. It may take six hours, it may take two days, depending upon the quality of workmanship, and the condition of the tank before the water is put in. The more work you do on the tank before you put in the water the less trouble you will have with the test.

Mr. KENT.—Before we conclude I have one witness more, and possibly two, but we cannot finish it to-night, because I have to catch the six o'clock train.

The COMMISSIONER.—The matter will be continued then until Tuesday, May 28, 1929, at two o'clock P. M.

[Endorsed]: Filed Jul. 15, 1930. [230]

Tuesday, June 4, 1929.

TESTIMONY OF J. A. CHRISTIE, FOR DEFENDANT.

J. A. CHRISTIE, called for the defendant, sworn.

Mr. KENT.—Q. Mr. Christie, will you please give your name and occupation?

A. Terminal superintendent of the Atchison, Topeka & Santa Fe.

Q. How long have you been superintendent of terminals for the Santa Fe?

A. Something over six years.

Q. And China Basin Yard and our freight slips are in your jurisdiction, are they not? A. Yes.

Q. And under your supervision? A. Yes.

Q. I will now show you a chart marked "A. T. & S. F. Co., Terminal Division Plan of China Basin, Assistant Engineer's No. 500–241–E," and ask you to state, generally speaking, what that is.

A. This is a general outline of what is known as the China Basin premises, including the channel and car slip where they load and unload car barges.

Mr. KENT.—If there is no objection, I would ask that this be introduced in evidence and marked Respondent's Exhibit Christie No. 1.

Mr. SAWYER.—No objection.

(The document was marked Respondent's Exhibit Christie No. 1.)

Q. You are acquainted or familiar with the ship known as the "Lansing," are you not, Mr. Christie?

(Testimony of J. A. Christie.)

A. Yes.

Q. Did you see her about the 16th of November, 1926? A. Yes.

Q. At the time that the collision occurred between the "Lansing" and the tug "Payson," was it not?

A. It was while she was undergoing repairs.

Q. Would you indicate to Mr. Christie on the diagram where the [231] "Lansing" was berthed?

A. Here is the "Lansing," here.

Q. By "here," you refer to a berth on Pier 46?

A. Yes.

Q. Which is approximately in the place of the suggested vessel marked "Santos": Is that correct? A. Yes, that is it.

Mr. SAWYER.—Q. The "Santos" does not purport to represent the "Lansing"?

A. No.

Mr. SAWYER.—That does not purport to represent the "Lansing," but merely show her position.

Mr. KENT.—It merely shows her position, and the position of the berth.

Mr. SAWYER.—There is nothing about the "Santos," is there, that corresponds to the "Lansing," either in length, or beam, or anything of that kind?

Mr. KENT.—Not at all; it simply indicates approximately the location of the vessel.

Q. Mr. Christie, how many years have you been down there?

A. I have been there six years last February.

(Testimony of J. A. Christie.)

Q. As part of your business, did you have occasion to observe the movements of our car barges, and tugs, and the vessels, generally, in the area marked "channel," opposite our freight slips?

A. Yes.

Q. Have you noticed any vessels loading or unloading in the position which is approximately where the "Lansing" was berthed at that time, marked "Santos"? A. Yes.

Q. Can you state if it is customary, or if you have observed, any such vessels berthed as I have stated, loading or unloading from lighters which are moored on our outboard side, while such vessel was located as I have designated?

Mr. SAWYER.—I object to that unless its relevancy and pertinency to this case is shown. If it depends upon a custom, I object to it on the ground there is no proof that the custom [232] was known to the owners of the "Lansing," if it has any bearing on the case—what is your purpose, Mr. Kent?

Mr. KENT.—The purpose is, I think, obvious; as I recall the testimony given here by Captain Dedrick, as to the inability to load supplies on various ships, such as coal, and fuel, and one thing and another, on the ground there was no room for loading or handling barges with other vessels alongside of the "Lansing," as she was moored, I propose to show by this witness that he has observed on many occasions the berthing, and loading, and

(Testimony of J. A. Christie.)

unloading of ocean-going vessels at the point where the "Lansing" was berthed.

Mr. SAWYER.—He has not so testified yet.

Mr. KENT.—I said I am going to show that.

Mr. SAWYER.—I am going to object to it on the ground that the evidence is immaterial, irrelevant, and incompetent, unless the vessels in question are of the same general type as the "Lansing," I mean as to size, and beam, and everything else.

The COMMISSIONER.—Let the testimony go in subject to the objection.

Mr. KENT.—Q. What type of vessels have you observed at various times berth at Pier 46, generally speaking?

A. There is almost everything comes in there, the Hamburg-American ships, and the Holland-American, and the line that the "Annie Johnson" belongs to; a miscellaneous number of ships come in there, of different types, different dimensions.

Q. Were they ocean-going vessels?

A. Yes, many of them.

Q. What have you to say, that is, to say generally speaking, with reference to their size, compared to the "Lansing," as you observed her?

A. They are much larger than the "Lansing," many of them.

Q. Will you state, Mr. Christie, what you observed in connection [233] with mooring lighters or barges alongside of these vessels.

A. It is a common practice to moor lighters

(Testimony of J. A. Christie.)

alongside of these vessels, the large and the small ships, as well, for different purposes, loading and unloading different commodities. There was a ship in there; she was there about a week, but she is gone now.

Mr. SAWYER.—That is objected to; that is long after the accident.

Mr. KENT.—I think the witness can explain his answer; he has in mind some examples that he does, and he can give them.

Mr. SAWYER.—I submit the objection.

The COMMISSIONER.—Let the question be answered.

Mr. KENT.—Go ahead and answer it.

A. This ship came in with a cargo of sugar that had caught fire outside somewhere, and there was a lighter at the side there for over a week. I did not keep track of the days, but I was impressed with the fact that she showed signs on the hull of being afire, and in distress, and different things; she was there, I imagine, in about the same position where the "Lansing" was. Later on they moved her further out toward the bay.

Q. The lighters that you have reference to were moored on the outboard side of this vessel, and approximately as indicated on the diagram?

A. Yes. There were lighters in there moored to this dock, ship, with fuel, and lumber, and grain, what make up miscellaneous cargo.

Q. Both loading and unloading?

A. Mostly loading out.

(Testimony of J. A. Christie.)

Q. Mr. Christie, did you observe the "Lansing" while she was being repaired? A. Yes.

Q. And did you see the hole in the hull?

A. Yes.

Q. You saw it when she was first hit by the tug, did you not?

A. Yes, the next morning after the accident. [234]

Q. Then did you see her and observe the hole during the course of the repairs? A. Yes.

Q. Do you recall how high the lowest portion of the opening was above the water after all of the plates had been taken out and before the new plates were placed in the vessel?

A. Yes. I was interested, and my point of observation was across the channel. I did not go down to the ship, but it seems to me to be about three feet from the place where I was. I know I made some inquiry about the raft that they were using there, and the space they would have to work on after the sheets were out.

Q. You did not go on the vessel? A. No.

Q. You observed it from across the channel?

A. I did not go below and look at the hole.

Q. That is, from across the channel, you mean from your office window?

A. No, from the dock. Many times I looked over there. It seemed to me that she needed about three feet to save the wash of the steamers going in and out of there, getting inside of the hull of the ship.

(Testimony of J. A. Christie.)

Q. Did you observe the water conditions during the time that she was in the course of repairs?

A. Yes, in general. I could see the workmen engaged in the process of replacing the sheets.

Q. Were you close enough to see whether there was any interference from water washing in, or anything of that sort? A. No.

Mr. SAWYER.—I object to that, unless it is shown Mr. Christie was there all the time.

Mr. KENT.—I asked him if he could see any, and he answered no, he could not. I asked him if he was in a position where he could see, and he said no. That settles that.

The WITNESS.—The raft and the working platform were on that side.

Q. That would interfere with your view?

A. Yes. [235]

Mr. KENT.—That is all.

Cross-examination.

Mr. SAWYER.—Q. Mr. Christie, you have never observed any ocean-going vessels receive or discharge cargo from lighters while they, themselves, were undergoing repairs at that dock, have you?

A. Well, yes—

Q. (Interrupting.) I mean water-line repairs, or close to the water-line. A. Oh, no.

Q. You have never seen that?

A. Not that same character of repairs, no.

Q. Repairs on the upper works, or something of that kind? A. The engines and such as that.

Q. Yes, inside, but you have not seen a vessel

(Testimony of J. A. Christie.)

there a hole close to the water-line, receiving or discharging cargo from lighters, have you?

A. No.

Q. Now, as a matter of fact, when this vessel was lying there, the "Lansing," there was a lighter already alongside of her, was there not, from which they were making the repairs? You specified a raft. A. That is what it was, a raft.

Q. How large was that raft?

A. I would say it would be about 25 feet long and perhaps seven or eight feet wide.

Mr. KENT.—Q. How many feet wide?

A. About seven or eight feet.

Q. Seven or eight feet wide?

A. Yes, something like that, just a platform.

Mr. SAWYER.—Q. That raft was just about amidships, the contact was just about amidships, was it not?

A. I think so. It shows on the print, somewhere.

Q. Now, if it were in evidence in this case, if anybody testified that the amount of free-board from the water-line to the top of the last plate that was left in place was from twelve to fifteen [236] inches, you would not want to dispute that, would you, from your point of view?

A. No, inasmuch as my point of observation was quite some distance across the channel. What I was interested in particularly was that there was enough free-board there to take care of their working platform.

(Testimony of J. A. Christie.)

Q. The working platform was about how high out of the water?

A. I should say five or six inches; it might have been a foot or more.

Q. Just a little raft. A. An ordinary raft.

Q. I think Mr. Kent explained that you were never in a position to see whether the wash of passing steamers went into that hole, or not.

A. Not from personal observation, but I made inquiry—

Q. (Interrupting.) That is all hearsay?

A. Yes.

Q. You did not see that, yourself? A. No.

Mr. SAWYER.—That is all.

Mr. KENT.—That is all.

TESTIMONY OF E. F. CALLAHER, FOR DEFENDANT.

E. F. CALLAHER, called for the defendant, sworn.

Mr. KENT.—Q. Will you please state your business, Mr. Callaher?

A. Master mechanic, Terminal Division, Atchison, Topeka & Santa Fe Railway.

Q. Just briefly, Mr. Callaher, give us your experience in the mechanical field in connection with the Santa Fe.

A. Well, from machinist to master mechanic, all of the repairs for twenty-six years. In this territory I was appointed assistant master mechanic, February, 1922, and master mechanic November,

(Testimony of E. F. Callaher.)

1925. And since the time the time I was appointed assistant I have been responsible for the maintenance of the marine equipment.

Q. The Santa Fe marine equipment consists of what?

A. Two ferry [237] passenger steamers, four tugs at the present time, and five car floats.

Q. Mr. Callaher, you have stated that you had charge of the maintenance of this equipment.

A. Yes.

Q. Repairs, etc.? A. Yes.

Q. As to your general duties as terminal master mechanic, what type of mechanical work does it consist of?

A. In charge of all locomotive and car repair work.

Q. Repairs to cars, locomotives, and other railroad equipment?

A. Other railroad equipment, also.

Q. What experience, in connection with repair work and mechanical work of the character that you have described have you had in the matter of estimating distances, sizes, and dimensions, etc.?

A. That would be the result of mechanical training, and mechanical experience.

Q. In handling your various jobs that factor of estimation is used by you considerably, is it?

A. Yes.

Q. Did you observe the "Lansing" at any time after she was tied up at Pier 46, and after the collision occurred with Santa Fe tug "Peyson"?

(Testimony of E. F. Callaher.)

A. I was on board the steamer "Lansing" on November 17, and then again on board on November 19. I went on board on the 17th to observe the damage done.

Q. Will you state, Mr. Callaher, in your own way, just what you observed with regard to the hole in the side of the vessel, and as to the various times that you made this observation?

A. When I was aboard on the 19th the damaged plates had been removed from the side of the ship, and, as I remember my observation, at that time, made from a position inside of the ship—I was within two or three feet of the side—my recollection is that the upper edge of the hull plate—the upper edge of the hull plate not removed would be from about sixteen to eighteen [238] inches above the water. That is, as I recall, as I looked through the side of the ship, through the hole in the side of the ship.

Mr. KENT.—That is all.

Cross-examination.

Mr. SAWYER.—Q. When you observed this opening in the hull of the "Lansing" on the 19th, how many plates had then been removed?

A. As I recall, three.

Q. Three? A. Yes.

Q. Now, how did you estimate that distance as 16 to 18 inches? I mean what factors, as a standard of comparison, entered into the opinion that you formed?

(Testimony of E. F. Callaher.)

A. I think what makes me recollect it best of anything is there are times when I have to make repairs to my own equipment, and I have to make those repairs with either locomotive machinists or car men; in other words, they are not marine men; and when I have to work from a float I am always somewhat alarmed that some of my fellows may drown. Now, as I recall, as I looked through the hole in the side, the thought came to me, "Well, this is an easy job." They were working right at a float height, the men could work on the float easily without having to build scaffolding, or work from a hanging scaffold. I think that is why it comes to my mind.

Q. But I do not think you have got quite the force of my question. The first thing you would have to determine would be, of course, where the water-line was with reference to the height of the edge, would you not?

A. I could see the water.

Q. Well, you could see the water from what point of view? A. From where I stood.

Q. From the inside? A. Yes.

Q. Yes, but naturally you would see the water at the glance of [239] your eye at a point three, or four, or perhaps more feet from the side of the vessel, wouldn't you?

A. Possibly from where I stood I was within four or five feet from the water, with my eyes looking down.

Q. Now, I evidently do not make myself clear.

(Testimony of E. F. Callaher.)

You did not see the water that was lapping the side of the vessel, did you?

A. Not at the actual point of contact, no.

Q. No, you did not. In other words, what you shot was an angle with your eye?

A. Acute, though.

Q. Acute angle? A. Yes.

Q. Your glance landed on the water? A. Yes.

Q. Which, of course, is very incorrect language. How far should you say from the side of the vessel —I am trying to do a little triangulation.

A. I would say about two and a half feet.

Q. Exactly. So you did not make any measurement from the water line with a tape, or anything else to the vessel? A. No.

Q. To the top of it? A. No.

Q. By the same token, you had no way of ascertaining at what point on the inside skin of the vessel it represented the water level outside, did you?

A. No.

Q. So that was a variable approximation, was it not? A. I think it was close.

Q. But you would not dispute a man who differed with you, who said it was 12 to 15 inches, instead of 16 to 18 inches?

A. Well, he would not convince me that I was wrong.

Q. You think that your margin of error was not over three inches?

A. It would not be greater than that. It would be less than that.

Q. Now, as a matter of fact, in all of the exper-

(Testimony of E. F. Callaher.)

ience that you have had in estimating distance, you have been in a position [240] where you could see all of the factors necessary to form a conclusion, haven't you? That is, you have been standing so that you got a profile view: Isn't that right?

A. No.

Q. Well, give us an illustration where you would not get a profile view.

A. Various locomotive parts, various locomotive sizes, you will estimate a certain board or certain length rod.

Q. But it is all right in front of you, is it not?

A. No; I may have angular views; that is, I would not move directly in front.

Q. Let me put it to you this way: The thing that you were looking at was in a different plane from the plane of your eye? If you pass a plane at right angle to the surface of the earth through your eye that would give one plane. A. Yes.

Q. And the object that you were observing was in a plane substantially parallel to that, and in front of you, isn't that correct? A. Correct.

Q. So that you have never had to visualize a plane which you could not see and which was passed substantially through the eye. Do you see what I mean?

Q. Yes. I have to do that constantly.

Mr. KENT.—It is rather complicated to me.

Mr. SAWYER.—Do you understand what I mean?

A. I have to do that constantly. If I might explain—

(Testimony of E. F. Callaher.)

Q. (Interrupting.) I wish you would.

Mr. KENT.—Do you want a piece of paper?

A. No. The federal law says that a locomotive pilot—this is just an instance—cannot be less than nor more than six inches above the rail, otherwise it constitutes a federal defect. It states that the footboard on the front of the switch engine canno be nearer the rail than nine nor more than twelve inches above the rail. Now, it is a fact that we employ inspectors [241] to check our locomotives and cars against penalty defects, but those men will sometimes overlook defects. And I have made it a practice always—I am through the roundhouse, as a rule, at least once a day, and as I go along I will look at the various heights, the height of sand pipes above the rail, and different things as I walk along. That is the training that I mean.

Q. Let me put it to you this way: Your datum line is the rail, is it not? A. Yes.

Q. Always visible, is it not? A. Yes.

Q. And the thing that you are trying to determine is a certain distance above the rail? A. Yes.

Q. That distance is always visible, is it not?

A. Yes.

Q. In the case of the "Lansing," your datum line was the water-line, was it not? A. Yes.

Q. And the water-line was not visible at the point where it contacted with the ship?

A. But still I believe—

Q. (Interrupting.) Just a minute, answer that question.

Mr. KENT.—Let the witness answer.

(Testimony of E. F. Callaher.)

Mr. SAWYER.—He is not answering my question, that is what I am complaining of.

Mr. KENT.—Let him answer it.

Mr. SAWYER.—He said, "Still I believe"—

The COMMISSIONER.—Answer that question, was it visible to your eye, the contact of the water-line with the ship?

A. No, I said it was not.

Mr. SAWYER.—Read the question to him.

(Last question repeated to the reporter.)

Q. That water-line was your datum was it not?

A. Yes.

Q. It corresponded to your rail, didn't it, as a datum? A. Yes.

Q. That is right, is it not? A. Yes.

Q. Have you had any experience in estimating the distance where [242] you had to guess at where the datum was?

Mr. KENT.—Explain your answer. Just a minute. You get the witness to answer the question "Yes" or "No," but he is entitled, with all due respect, to explain the answer. Let him do it.

Mr. SAWYER.—Just a minute, now. Wait until I finish. I submit that when his answer is that he has never had any occasion to measure the distance from a datum which he had to estimate and could not see, there is no explanation.

Mr. KENT.—That is argumentative. Let the witness explain.

Mr. SAWYER.—Read the last question.

(Last question repeated by the reporter.)

A. No, I think I can explain it.

(Testimony of E. F. Callaher.)

The COMMISSIONER.—Proceed.

A. I will go right back to locomotive and car work.

Mr. SAWYER.—All right, I don't care where you go, as long as we get your experience.

A. Take coupler heights, your locomotive coupler heights, the center of your coupler must not be less than 31½ inches, nor more than 34½ inches above the rail, and yet when you look at that coupler as it stands, your rail test line is purely imaginary, because you are drawing a line in your mind across the rail.

Q. Exactly, I quite agree with you, but the imaginary line that you draw is to connect two points, both of which are entirely visible: Isn't that right?

A. Correct.

Q. That is right, is it not? A. That is right.

Q. Now, then, the imaginary line that you had to draw in the case of the "Lansing," involved placing the water level with relation to the outside skin of the ship at a definite point, [243] didn't it? A. Yes.

Q. And you could not see the definite point which you were to connect on the outside of the skin of the ship, could you?

A. No; but I do not see the definite point as far as coupler heights are concerned, I estimate it.

Q. You estimate the height, I agree with that, but you estimate it from a base line which is either actually visible or is an imaginary line drawn between two points, both of which are actually visible: That is correct, is it not? A. Yes.

(Testimony of E. F. Callaher.)

Q. And you did not have any of those factors in the "Lansing"?

A. Could I not consider my base line the water-line?

Q. Yes, I have no objection to your doing that, but, at the same time, you did not see with your eye the point at which your base line, the water-line, intersected the right angle formed by the outside skin of the ship? A. No.

Q. And yet, in every case that you have put your datum line has either been entirely visible, or else it has been an imaginary line, and connected two points, both of which were entirely visible?

A. Yes.

Q. Now, just to clear up any uncertainty there may be in the record, when you say the upper edge, you mean, of course, do you not, the upper edge of the lowermost plate left in position? A. Yes.

Mr. SAWYER.—That is all.

Redirect Examination.

Mr. KENT.—Q. Just a few questions; it may be clear to you and Mr. Sawyer, but it is not to me. Now, in estimating the height of these couplers, for instance, above the ground, can you actually see the bottom of the coupler, the exact point where the bottom is with reference to the ground? A. No.

Q. Your answer is no? A. No. [244]

Q. Then in estimating the height, the actual height of the coupler above the ground, you have to guess at how far down the coupler hangs, don't you? A. Yes.

(Testimony of E. F. Callaher.)

Q. That is, you have a quantity or a condition which you have to assume in determining that height,—whether it be the variable at the top of the measurement, or at the bottom, does not make any difference?

A. I have two conditions that I must estimate; I must first judge the center of the coupler face, which is usually eleven inches; I must strike a center, and then estimate to the line across the top of the rails.

Q. Then the actual position of the lower face of the coupler, if you want to put it that way, and the bottom of the coupler, when you are making your estimate as to how high that coupler is above the ground, you cannot see it?

A. The lower face, no.

Q. Then you have to guess as to where that is, don't you? A. Yes.

Mr. KENT.—That is all.

Recross-examination.

Mr. SAWYER.—Let us go back to your coupler. Your coupler is that iron protuberance that sticks out from the platform: isn't that right? A. Yes.

Q. Which is roughly about ten or twelve inches high, and eight or nine inches wide? A. Yes.

Q. That is about right? A. Yes.

Q. And all of that is visible, is it not?

A. It depends upon your angle of view.

Q. You can get to a point where it is all visible?

A. Yes.

(Testimony of E. F. Callaher.)

Q. When you are making this estimate of measurement, you usually get to such a point, don't you?

A. Not always, no.

Q. You would not stand in a place where you could not see any part of the coupler, would you?

A. Yes, I estimate from the side as I walk along. [245]

Q. But you never select a point of view where you cannot see any part of the coupler?

A. I always see some part of the coupler.

Q. And you would always manage to see the lowermost part of the coupler, too, wouldn't you?

A. No.

Q. What part of the coupler would you see?

A. The face.

Q. What do you call the face?

A. The vertical face.

Q. That vertical face, of course, has a topmost part and a lowermost part? A. Yes.

Q. If you see the vertical face you see both the topmost and lowermost part, don't you? A. Yes.

Q. So you see a profile, or elevation, don't you, of the coupler?

A. I don't know if I can answer it this way, or not, that with experience, your gaze is attracted to the center of that face.

Q. Now, suppose that sheet of paper represented a coupler, the topmost part of which would be the top of it, and the bottom would be here. A. Yes.

Q. Your point of measurement is from the center of the coupler to the rail? A. Yes.

(Testimony of E. F. Callaher.)

Q. And admitting this represents the face of the coupler—

A. (Interrupting.) Put it the other way, put it lengthways.

Q. This represents the face of the coupler.

A. Yes.

Q. Your datum line is the rail, is it not?

A. Yes.

Q. And that is an imaginary line connecting the two rails? A. Yes.

Q. And both rails are visible when you make your estimate? A. Yes.

Q. So your imaginary line connects two visible objects? A. Yes.

Q. The whole face of your coupler is visible is it not? A. Yes.

Q. You have, first, that to estimate the middle of the face, and next from that point to estimate the distance to a datum line which either is visible or else is an imaginary line connecting [246] two objects which are visible. A. Yes.

Q. So every one of your fixed quantities, your datum line or the point through which an imaginary datum line is drawn, are visible, the entire face of your couple is visible, and the only variable that you have is your faculty for estimating the exact center of that coupler, and the distance from that exact center to your datum line: That is true, is it not? A. I believe you do not give credit—

Q. (Interrupting.) Just a minute—

The COMMISSIONER.—Q. Having the hypo-

(Testimony of E. F. Callaher.)

tenuse of a right-angle triangle, can you estimate the triangle? A. I think I can, closely.

Q. From your experience as a mechanic, in your work, have you made that estimate frequently?

A. Yes.

Q. You have the hypotenuse of the right-angle triangle where the base of the triangle is the distance from your eye strikes the water to the skin of the ship, and the perpendicular is from where the water strikes the skin up to the edge of the opening that you are looking at. A. Yes.

Q. Do you think you have ability to estimate that triangle? A. I do.

Mr. SAWYER.—Q. Where did you get it from?

A. Experience.

Q. I know, but where in your work have you had to estimate the height of a triangle when you only had the length of the hypotenuse to go by?

Mr. KENT.—He has the hypotenuse, and he has the upright; he knows how tall he is, or where he is standing; he has two factors.

The COMMISSIONER.—Of course, this is a matter of experience. I am satisfied that this witness is an expert in his mechanical work, and that he can go along and quickly see that the distance [247] of these footboards and the distance of the couplers is either right or not right, that the variance may be very little but he would quickly notice it, and it is a question of whether or not he can estimate the distance of that right-angle triangle formed by his vision to the water, and that is a matter of argument from his experience.

(Testimony of Albert H. Ruling.)

Mr. SAWYER.—I think I have gone far enough with the witness to found an argument on it. I call attention to the fact that his maximum is only three inches apart from the maximum given by our own witness.

The COMMISSIONER.—You can argue that, but you have got the evidence, so far as that is concerned.

Mr. SAWYER.—That is all.

Mr. KENT.—That is all.

TESTIMONY OF ALBERT H. RULING, FOR DEFENDANT.

ALBERT H. RULING, called for the defendant, sworn.

Mr. KENT.—Q. Just give us your business.

A. Marine engineer.

Q. Employed by the Santa Fe?

A. Employed by the Santa Fe Ry. Co.

Q. You were detailed, were you not, to more or less supervise or observe, in a way, the repairs which were carried on on the "Lansing," in connection with the collision? A. Yes.

Q. State, please, what you observed with regard to the opening, that is, the height above water, and when you observed it, and how you observed, and give us all of the details that you have in mind with regard to it, without your being asked questions; state what you know.

A. As I remember, they removed three plates, two on the top, and one on the bottom, and sections

(Testimony of Albert H. Ruling.)

of the shell bars, and that opening from the plate on the bottom of the water I judge to be about fifteen to eighteen inches [248] from the float.

Q. Did you observe the repair work continuously, Mr. Ruling? A. Yes.

Q. That is, you were on the job all of the time, were you? A. Off and on all day, yes.

Q. What have you to say as to the condition of the water, and as to the lapping in of any water?

A. The only lapping in that I saw was a few rivet holes where they had removed the shell bars and they had those plugged with wooden plugs.

Q. That is, did any water lap in after the plugs were put in? A. I never noticed any.

Mr. KENT.—I think that is all.

Cross-examination.

Mr. SAWYER.—Q. You measured that fifteen to eighteen inches from the top edge of the lower most plate, didn't you? A. Yes.

Q. Now, as a matter of fact, that edge, or, rather, that lower plate has two parallel lines of rivet holes below the edge, hasn't it? A. Yes.

Q. Those were all open, weren't they?

A. Yes.

Q. How much would that reduce your freeboard? A. About two and a half inches.

Q. Water goes through those holes just as well as anywhere else, desn't it?

A. I would say it would, but I saw none.

The COMMISSIONER.—Q. You said they were plugged?

(Testimony of Albert H. Ruling.)

A. No, I said the section of the shell bars that were removed, they were plugged.

Mr. SAWYER.—Q. But these holes were not plugged, were they?

A. No.

Q. The parallel rivet holes? A. No.

Q. The two lines on them? A. No.

Q. Did you keep any diary or record of this?

A. If I did it is in [249] the files of the report on it.

Mr. SAWYER.—May I see it?

Mr. KENT.—I will see if I have got it.

Mr. SAWYER.—Q. Mr. Ruling, what are your duties in connection with the Santa Fe?

A. Operating duties, repairs.

Q. Are you in the operating department?

A. Running on the towboats.

Q. Running on the towboats? A. Yes.

Q. Have you any marine license? A. Yes.

Q. What?

A. Chief of bay and rivers, and first assistant, ocean.

Q. That is, in the engineering department?

A. Yes.

Q. Are you attached to any one of the fleet?

A. Yes.

Q. What one?

A. Right now it is the tug "Ripley."

Q. At the time of the collision, what were you attached to? A. The "Peyson."

Q. Were you taken off the "Peyson"?

(Testimony of Albert H. Ruling.)

A. Well, we swing around from one job to the other.

Q. Well, during the time of the "Lansing" repairs, did you perform any operating duties, at all?

A. No, I was assigned to the "Lansing."

Q. What time in the morning did you get there?

A. I was there at different times, no set time, all during the twenty-four hours of the day I would keep running down at different times.

Q. What is the earliest you ever got there?

A. Around seven o'clock.

Q. Then how long did you stay there continuously? A. I would stay a couple of hours.

Q. Then what did you do?

A. I was looking around the boat, and would go away.

Q. Where did you go?

A. Over to the Santa Fe Office.

Q. Inside of the office? A. Yes. [250]

Q. How long were you absent from the work?

A. During the day, the working hours, I was not absent more than an hour or so at a stretch.

Q. An hour or so at a stretch? A. Yes.

Q. How many times during your working day would you be absent an hour or so at a stretch?

A. I never kept track of it, two or three times, maybe.

Mr. KENT.—We did not offer the witness to show that he was observing the "Lansing" with a lynx's eye all of the time.

(Testimony of Albert H. Ruling.)

Mr. SAWYER.—No, I should say he had anything but a lynx's eye. I never knew a lynx to be off three hours at a stretch.

A. I was not off the job three hours at a stretch.

Q. Three periods of an hour each?

A. That is approximately, I would say *say* exactly.

Q. It is, of course, possible that things occurred during your absence that you knew nothing about, is it not?

A. Yes; I said that I observed things there, I did not see everything.

Q. When you were around the "Lansing," what was your post of observation?

A. I was down on the float during the noon hour when I would not be in the way of the workmen, and otherwise I was inside of the hole.

Q. Inside of the hole? A. Yes.

Q. In what compartment?

A. In the fireroom.

Q. The fireroom?

A. Where they were working.

Q. Where they were working? A. Yes.

Mr. SAWYER.—I think that is all.

Mr. KENT.—Here is the report.

Mr. SAWYER.—I notice in this report furnished me by Mr. Kent that one of your duties was to advise with the Eureka Boiler Works if by working overtime the work could be completed [251] sooner.

Mr. KENT.—I do not think that is material.

(Testimony of Albert H. Ruling.)

Mr. SAWYER.—I think it is material on the whole question of intent. One of the issues in this case is whether expedition was used. Here is the man who was employed to see that expedition was used. I want to find out what he has to say about the expedition that was used.

Mr. KENT.—All right. Ask him all about it.

Mr. SAWYER.—Q. Did you make any recommendation to the Eureka Boiler Works?

A. No, I never made any recommendation.

Q. In regard to working overtime, or anything else?

A. No. I asked them, when I was instructed to ask them, if the work could be completed sooner by working overtime.

Q. What did they say? A. Yes.

Q. And did they work overtime? A. Yes.

Q. They did? A. Yes.

Q. One of your duties there was to see that the work was done with expedition, was it not?

A. Yes.

Q. Was it done with expedition? A. Yes.

Q. You had no complaint or criticism to make?

A. I had nothing to say about it; I was just there to observe and see that they kept working.

Q. They did keep working? A. Yes.

Q. The work was performed with expedition?

A. Yes.

Q. Mr. Ruling what year did the collision with the "Lansing" take place, do you remember?

A. 1926.

(Testimony of Albert H. Ruling.)

Mr. SAWYER.—I think it was 1925.

Mr. KENT.—No, it was 1926.

Mr. SAWYER.—Your report was dated January 5, 1926; that is an error, is it not? It should be January 5, 1927?

A. No, that is when I put in the report. [252]

Q. January 5, 1926?

A. I made a mistake; it should be January, 1927.

Q. But at any rate, your report was not prepared and submitted to your superiors until after the claim for demurrage was made, was it?

A. I don't know just when the claim for demurrage was made. I put that in as soon as I got through on the job.

Q. You knew at the time you wrote this report that a claim for demurrage had been made, didn't you?

A. I did not know for sure about it; I did not have any instructions to that effect.

Mr. KENT.—Did you know anything about it?

A. I imagined it was going to be, yes; I did not know anything definitely.

Mr. SAWYER.—You knew, in other words, that the owners were claiming demurrage at the time you made that report?

A. There was a hint of it, but there was nothing definite on it.

Q. In fact, your report states, does it not, to advise with Eureka Boiler Works if by working overtime the work could be completed sooner and thus cut down possible demurrage charges?

(Testimony of Albert H. Ruling.)

A. I was asked to do that.

Mr. SAWYER.—I would like to offer that report in evidence.

Mr. KENT.—I can see no use in it, but I have no objection to letting it go in.

(The report is marked Respondent's Exhibit Ruling 1.)

Mr. SAWYER.—Q. Now, Mr. Ruling, you say the height of the hole from the water, to the top edge of it, was fifteen to eighteen inches?

A. Yes.

Q. How did you come to make that estimate?

A. Just an approximation.

Q. I know, but what was your interest in it?

A. Like any other interest, to look at the hole in the ship to see how far it is from the water.

Q. I know, but what interested you whether it was fifteen to [253] eighteen inches, or thirty-six inches? A. No real interest.

Q. No real interest, at all? A. Curiosity.

Q. Just curiosity? A. Yes.

Q. So, without having your attention directed to it at any time, in any shape, manner, or form, you now tell us it was fifteen to eighteen inches?

A. About that.

Mr. KENT.—I do not think that is a proper question.

Mr. SAWYER.—I will take a ruling on that.

Mr. KENT.—The question assumes that.

Mr. SAWYER.—It made no difference to you,

(Testimony of Albert H. Ruling.)

Mr. KENT.—He did not have a label on him, did he?

Mr. SAWYER.—I know.

A. I could not tell you that.

Q. Describe him.

A. There were a whole lot of them that looked [255] alike to me.

Q. You regarded that as of sufficient importance to incorporate in your report, didn't you?

A. In regard to the length of time of filling.

Q. Exactly, and you have just testified now that they told you on the "Lansing" that they were going to use the 2½-inch main; therefore, your attention was focused on that point, was it not?

A. Yes; I wanted to see what difference it would make getting filled up on the other side.

Q. Who told you that on the "Lansing"?

A. That is what I told you, I don't know who it was.

Q. A deck hand? A. No.

Q. A coal heaver?

A. There were no coal heavers on it.

Q. Was it the captain?

A. No, it was not the captain.

Q. Was it the chief officer?

A. I didn't know the chief officer.

Q. Was it the chief engineer?

A. I told you I don't know who the man is, I don't know his name.

Q. You just said you knew it was not the captain. A. I knew the captain.

(Testimony of Albert H. Ruling.)

Q. You did know the captain?

A. Yes, from my meeting him there.

Q. Did you verify from the captain whether they intended to use the two and a half inch main?

A. No.

Q. When did you finish your work on the "Lansing"? A. I don't remember the date.

Mr. KENT.—The report speaks for itself.

Mr. SAWYER.—Does it show? Of course, I have not the report before me, Mr. Krull has it.

The COMMISSIONER.—Here it is.

Mr. SAWYER.—I did not mean to take it away from you.

The COMMISSIONER.—That is all right.

Mr. SAWYER.—Q. Now, when did the repairs start? [256]

Mr. KENT.—Again I submit that the report which has been offered and introduced in evidence speaks for itself. I submit that the report of Mr. Ruling is the best evidence on any of the matters contained therein, and the examination of him as to details of it seems to be immaterial.

Mr. SAWYER.—Unless the report is proven to be inaccurate.

Mr. KENT.—That is up to you.

Mr. SAWYER.—I am trying to lay a foundation for it.

Q. I notice in your report you say, "On Saturday, November 20, 1926, I was instructed by Mr. Arntz, of Mr. Christie's office, to go aboard the 'Lansing.'" A. Yes.

(Testimony of Albert H. Ruling.)

Q. Repairs had already started?

A. They had started. I don't know when they had started.

Q. You don't know when the repairs had started?

A. No.

Q. When you went aboard the "Lansing," the hole caused by the removal of the three places was already in evidence, was it not? A. Yes.

Q. So what happened aboard the "Lansing" prior to the 20th of November you don't know anything about, at all? A. No.

Q. Why, if your work was all completed on November 22, at 5 P. M., did you postpone putting in any report until January 5?

A. I don't know why, any particular reason.

Q. Did you, prior to the submission of this report, discuss the framing of it with any person connected with the Santa Fe? A. No.

Q. So, until you rendered that report, no one of the Santa Fe knew what the report would contain?

A. No.

Q. You have no explanation to offer for the delay of from November 22 to January 25, in rendering the report? A. No, I have no explanation. [257]

TESTIMONY OF E. F. CALLAHER, FOR DEFENDANT (RECALLED).

E. F. CALLAHER, recalled for defendant.

Mr. KENT.—Q. I refer you to a report of Mr.

(Testimony of E. F. Callaher.)

Ruling, which has been introduced in evidence, here; that came to you, did it?

A. Yes.

Q. Are you his superior officer? A. Yes.

Q. And did it come to you in the natural course of your business? A. Yes.

Q. Can you recall now any unusual circumstance with reference to the receipt of that report, or do you recall the circumstances under which it was received—probably that would be better.

A. It was made upon my request. I would have to consult my files, though, to know why the request was made, other than to complete his time while he was away from his regular line of work, in order to complete my files on the steamer "Lansing."

Q. Can you give us any idea as to the reason for the delay in filing the report between the date the work was completed and the date of the report?

Mr. SAWYER.—If you know.

Mr. KENT.—If you know.

A. No, not that I recall.

Q. Do you think that your files would indicate the circumstances under which the report was rendered? If at all material, I am perfectly willing to recall Mr. Callaher after he has examined his files, to state under what circumstances the report was rendered, if the Commissioner considers it of any material importance; I am perfectly willing that all of the facts surrounding this matter be brought out.

(Testimony of E. F. Callaher.)

A. I have my files with me, and I might look.

Mr. SAWYER.—I might say I offered the report for this reason, it was obviously prepared to meet the case, and as it is [258] highly corroborative of the case that has been proved I think it is a material factor.

Mr. KENT.—I think counsel's statement is improper, and I ask that it be stricken from the record.

The COMMISSIONER.—It will not be considered any evidence.

Mr. SAWYER.—It is purely argumentative.

Mr. KENT.—In view of the statement, I ask leave to recall Mr. Callaher at a later date.

The WITNESS.—I have my file now, if you wish me to look.

Mr. KENT.—Very well. It will be understood, pursuant to Mr. Sawyer's request, that Mr. Becker will be recalled at some future date for further cross-examination, with the understanding, however, that I may exercise the right or privilege on reconsideration of putting him on for further redirect.

Mr. SAWYER.—That goes without saying, as far as I am concerned.

Mr. KENT.—Have you found it, Mr. Callaher?

A. I assume that was the basis for my request for the report from Mr. Ruling.

Q. After looking over your records, Mr. Callaher, will you state what were the circumstances

(Testimony of E. F. Callaher.)

with regard to the rendering of the report by Mr. Ruling which is in evidence here?

A. On December 29, 1926, I received a letter from Superintendent J. H. Christie, stating that a representative of Cosgrove & Company, Inc., had called on him on that day and presented a claim of the California Sea Products Company which amounted to $9,015.02, $6,116.48 of which is demurrage. The last paragraph is, I recall, that Mr. Wright and yourself said you received certain information as to the time this vessel would have been ready to go to sea in the earlier stages of the repair work. We must now sum up all of this information which yourself and Mr. Wright can supply as [259] well as anything that Chief Engineer Ruling can give us, in order to make an early reply to Cosgrove & Company.

Q. That was a communication addressed to you by Mr. Christie? A. Yes.

Q. Then, as a result of that communication, what action did you take with regard to Mr. Ruling's report?

A. I wrote Mr. Ruling on January 3d, and I quoted to Mr. Ruling Mr. Christie's letter—I started my letter saying, "I am quoting Mr. Christie's letter."

Q. In substance, what did you say to Mr. Ruling in the letter, asking for his report? If necessary, we can introduce the letter.

A. I asked him for the report, asked him to be very careful in stating first on what date he was

(Testimony of E. T. Callaher.)

instructed to go aboard the ship and note the progress of the work. I also asked him to state what his instructions were from Mr. Christie, also the steps he took with the Eureka Boiler Works, etc.; in other words, give a write-up of his connection with the matter of repairs day by day in sequence; also what conversation he might have had with Captain Swanson, or Mr. Kline, or any other representative of the California Sea Products Company, owners of the "Lansing." I also told him I would retain a copy of the statement, as if this action should reach the courts we might all have to give the information under oath.

Mr. SAWYER.—Might I see that letter? Just point that out, because I do not want to paw through your files.

Mr. KENT.—There is no objection if you want to introduce them.

Mr. SAWYER.—I just want to see them. I do not want to incumber the record. That is all.

(By consent, an adjournment was here taken until Monday, June 17, 1929, at two o'clock P. M.)

[Endorsed]: Filed Jul. 15, 1930. [260]

[Title of Court and Cause.]

HEARING ON REFERENCE.

Wednesday, June 26, 1929, 2 o'clock P. M.

APPEARANCES.

For the Libelant: H. M. SAWYER, Esq.
For the Respondent: PLATT KENT, Esq.

TESTIMONY OF A. L. BECKER, FOR DEFENDANT (RECALLED).

Testimony of A. L. BECKER, recalled, previously sworn:

Cross-examination (Resumed).

Mr. SAWYER.—Q. Now, Mr. Becker, at your examination on Thursday, May 21, page 174 of the record, you were asked by Mr. Kent this question: "In your opinion how much of the test work on those tanks could have been completed during [261] the time that the repairs were going on, assuming the hole to be 12 or 13 inches above the water-line and assuming also they had not been tested before?" and your answer as it appears in the record is: "Both summer tanks could have been tested from the inside out and those on the deck and shell side on the starboard main cargo tank could have been all tested for two-thirds of their depth without diminishing the free-board of the vessel except for the summer tanks." Do you recall giving that testimony? Do you, Mr. Becker? What are you looking for?

(Testimony of A. L. Becker.)

A. I am looking for the—

Q. Page 174. That is fresh in your mind, is it?

A. Yes. I don't remember this feature: "the starboard main cargo tank could have been all tested for two-thirds of their depth without diminishing the freeboard of the vessel except for the summer tanks." Do you want me to explain what I meant there?

Q. No. I am going to ask you some questions.

A. All right.

Q. But you recall that that question was asked you and that answer was given; that is correct, isn't it? A. Yes.

Q. Now, in order to give that answer you would have to know something about the transverse stability of the ship, wouldn't you? A. Yes.

Q. What are the factors that determine transverse stability?

A. A relation of beam and depth, center of gravity of the hull, and the center of buoyancy of the displaced water.

Q. Would you have to know the displacement?

A. Yes; [262] to get the center of gravity.

Q. Certainly. Do you know the displacement of the "Lansing"? A. No.

Q. So then when you formed an opinion as to the transverse stability of the "Lansing"—

A. (Interrupting.) That it could or could not be done with safety, not knowing the factors?

Q. (Continuing.) —determining transverse sta-

(Testimony of A. L. Becker.)

bility must have been a little better than a guess, wasn't it?

A. No; because I have done that on ten or fifteen tankers.

Q. Let me ask you this question. You have to know displacement in order to determine stability?

A. Yes.

Q. You do; yes. A. To accurately—yes.

Q. When you are giving an opinion that certain things can or cannot be done without affecting the transverse stability, and if you don't know the displacement, which is one of the factors in determining transverse stability, you are really guessing, aren't you?

A. No. You are relying on your experience.

Q. On your experience? A. Yes.

Q. All right. On any of those tankers that you refer to were there any blubber pots on the forward deck? A. No, not that I know of.

Q. Do you know how many blubber pots on the "Lansing" were on the forward deck? A. No.

Q. Well, assume there were sixteen.

Mr. KENT.—This is something new.

Mr. SAWYER.—Well, I told you I was calling him back— [263]

Mr. KENT.—I know, but are we going to have that testimony as to the blubber pots?

Mr. SAWYER.—Yes.

Mr. KENT.—All right. We will open it up for proof again.

Mr. SAWYER.—Well, that may be.

(Testimony of A. L. Becker.)

Mr. KENT.—All right. I just want to understand what was going on.

Mr. SAWYER.—Surely; surely. I appreciate your difficulty and I hope you will also appreciate mine.

Mr. KENT.—Yes, that is perfectly all right. I just want to be sure you are now opening up the case again.

Mr. SAWYER.—Blubber pots; that should have been six instead of sixteen, as a matter of fact.

Mr. KENT.—That is better.

Mr. SAWYER.—Q. Now, on any of the tankers that you have had experience with were there any digestors or additional tanks on the after deck?

A. Nothing; only service tanks, fresh-water tanks.

Q. Were there any digestors? A. No.

Q. Do you know what a digestor is? A. Yes.

Q. Do you know how many there were on the "Lansing"? A. I do not.

Q. Well, assume there were 16. Now, on any of those tankers that you have reference to, was there any slicing machine on the forward 'tween-deck?

A. No.

Q. Now, at the time you gave that testimony, did you have any information at all, did you have any knowledge that there was this equipment on the "Lansing" that I have mentioned, that is, the six blubber pots, the 16 digestors and [264] a slicing machine on the forward deck?

A. I knew there was some equipment aboard but I did not know the details.

(Testimony of A. L. Becker.)

Mr. KENT.—Mr. Sawyer, may I interrupt? Might it not simplify matters if you gave him the aggregate weight of that equipment and ask him the question?

Mr. SAWYER.—Well, just a minute now.

Q. Can you form any estimate of the weight of the equipment, machinery and digestors?

A. No; not from what you have read.

Q. No. A. Yes.

Q. And you could not form any estimate of the weight at the time you were discussing the matter, could you? A. No.

Q. So your testimony was based entirely upon the similarity of the "Lansing" to other tankers?

A. Yes.

Q. And you did not take into consideration at all, did you, the fact the "Lansing" had been converted into a floating whale reduction factory?

A. I did.

Q. What consideration did you give to it?

A. I said that the tank, the main cargo tank could be filled two-thirds full. I have possibly many times filled one of the biggest tanks full and headed it up.

Q. I did not answer.

A. Filled the starboard or the port cargo tank and headed it up.

Q. Yes; and how many tons of water or oil or whatever the commodity was you were using; you were using water, weren't you? A. Yes.

Q. How many tons?

(Testimony of A. L. Becker.)

A. I would have to count the weight out.

Q. Can't you tell us offhand?

A. Not without calculating. [265]

Q. (Continuing.) —whether it was a thousand or ten thousand tons?

A. Just a minute; I will get it for you.

Q. Very well. While you are making that calculation, let me ask you this question: Are all tanks of uniform size on all tankers? A. No.

Q. So you are having in mind a particular tanker?

A. I am taking a big tank, that I know of in the tanker, the biggest tank, 30 feet long, which is beyond the rule.

Q. Thirty feet long? A. Yes.

Q. All right. Now, give us the capacity of that tank?

A. The one-third part of a tank would be about 260 tons and the center of the gravity, of the water in the tank, would be about 15 feet away from the center line of the ship, making the moment.

Q. Now, I did not ask you for all that. What I am asking you for is the simple question, what was the capacity of water that you had in mind in this large tank? Now, I don't want anything about—

The WITNESS.—Your Honor, is he talking to me about stability of a ship—

Mr. SAWYER.—No, I am not. I have asked you a simple question.

Q. How much water was in the tank which you headed up and you testified you headed up a tank

(Testimony of A. L. Becker.)

on the starboard side, and I want to know how much water was in it and you said you would calculate it.

Mr. KENT.—I object. He is entitled to answer it.

Commissioner KRULL.—Let him answer; he can explain his answer after he gives it.

Mr. SAWYER.—Q How much water? [266]

A. 260 tons over and above what I had actually placed in the tank before, that is—

Q. I don't understand that answer at all.

A. Well, I am *answer;* I said two-thirds full, the capacity of that tank would be about 780 tons.

Q. Capacity of which tank?

A. Of the tank, the problematical tank that I am talking about.

Q. Would be how much? A. 780 tons.

Q. Yes.

A. Now, I said two-thirds full, that leaves 260 tons that I was going on my statement in the book in which I purposefully deducted because of the fact I knew the "Lansing" had a load on the deck. This load was probably centralized and balanced. Now, I am telling you that the offset of this load is 260 tons, 15 feet off the center which gives us a foot tons moment of 4900 tons which is away in excess of what this load or most any load on a ship could be without effect on a ship if placed centrally.

Mr. SAWYER.—I move to strike the witness' answer which is a dissertation that was not responsive to the question at all. I just want to know the number of tons. I will get at this in my own way if—

(Testimony of A. L. Becker.)

Mr. KENT.—This is getting into the realms of highly technical shipbuilding construction. Now, Mr. Sawyer knows, no doubt, a great deal more about it than I do, but it seems to me we are entitled to the witness' views on the subject and if he is testifying to other than what Mr. Sawyer expects that is his hard luck. It seems to me the question has been answered and the answer should remain as it is in the record.

Mr. SAWYER.—I submit the answer is not responsive. [267]

Commissioner KRULL.—Let it remain as it is.

Mr. SAWYER.—I moved to strike out—

Commissioner KRULL.—On the motion to strike, it is denied.

Mr. SAWYER.—Exception.

Q. Now, I want to know how many tons of water were in that tank covered up on the starboard side of some tanker? A. The biggest one, 780 tons.

Q. As a matter of fact, you know, don't you, the "Lansing" tank contained about 1000 tons of water per tank?

A. Well, assume that to be true, we haven't any plans of the "Lansing"; we don't know anything about her tanks.

Q. But Mr. Egbert who was in charge of this matter for the Bureau Veritas and thoroughly familiar with the ship has testified in regard to it,—what I am trying to do is to match your opinion against his knowledge of the ship. A. All right.

Q. Now, to get back to my original question.

(Testimony of A. L. Becker.)

You don't know what the displacement of the "Lansing" was, do you? You don't know the center of gravity there, what it was?

A. Is it in the record where the draft was?

Q. No. A. Then I don't know.

Q. You don't know her center of gravity?

A. Well, I know the horizontal position of it because it is over the keel.

Q. But you don't know its position in relation—

A. (Intg.) To the main vertical lines?

Q. To the main vertical line of the ship?

A. No.

Q. And you don't know her center of buoyancy?

A. Put it half the draft and you will be very close to it. [268]

Q. But you don't know the draft, do you?

A. No.

Q. So, if you don't know any of those factors you have absolutely no means of determining the transverse stability of the "Lansing," have you?

A. Well—

Q. Have you?

A. The actual transverse stability cannot be determined without the whole architectural details relating to the "Lansing."

Q. Exactly. Now, then, if you cannot determine the transverse stability of the "Lansing" anything which you say with regard to this disturbance is, in plain English, a guess, isn't it? A. No.

Q. Why not?

(Testimony of A. L. Becker.)

A. Because my experience has been in the line of testing tankers.

Q. In testing converted tankers; tankers converted into a whaling factor?

A. I will make that this: In my experience,—I will qualify it by saying any one tank could be filled safely two-thirds full on the "Lansing," keeping in mind that it ought to have some deck load, and therefore a certain allowance should be made for that. Now, I have allowed 490 foot tons—

Q. Now, you are only going to test those tanks for two-thirds of their capacity; is that right?

A. Yes, if it could have been done that full.

Q. That was your testimony, wasn't it, two-thirds? A. Given as a final test.

Q. And I understand those tests could have been made while the collision repairs were being made?

A. They could have been done, yes. [269]

Q. Now, then, which tank was that, the starboard side; that is where you want to test them up to two-thirds, isn't it? A. Yes.

Q. You have then those tanks, the summer tanks, haven't you? A. Yes.

Q. Now, a test of two-thirds would not constitute any test at all of the top of the tank and the bottom of the summer tank, would it? A. No.

Q. Not at all? A. No.

Q. And so, even if it had been tested up to two-thirds during the collision repairs you would still have had to test it to its full capacity in order to

(Testimony of A. L. Beeker.)

get even an outside test on the summer tanks, wouldn't you? A. Yes.

Q. And after you had done that you would still have to test the summer tank? A. Yes.

Q. Now, then, if the condition was such that you could not say there was just a single caulking edge on one side, but on the contrary, the rivet went thru both ways so that you had a caulking edge on each side, you would have to have several tanks, wouldn't you?

A. Do you mean the rivets in the bulkhead of the summer tank,—between the summer tank and main tank?

Q. Yes.

A. Those rivets would get their test when the main tank was filled.

Q. They get the test on one side, wouldn't they?

A. Yes.

Q. But if there were rivet heads on the other side they would not get any test at all?

A. Then the summer tank [270] would have to be filled to give a test.

Q. Yes. So that after testing the main tank you would not get even any test on the bottom of the summer tank until the summer tank itself had been filled?

A. Yes; you could not pass the main tank until the bulkheads between the summer tank and main tank were passed because they are an integral part of the main tank.

Q. Yes. Well, I think you were misunderstand-

(Testimony of A. L. Becker.)

ing my question, probably because it is not accurately phrased. The riveting,—and I am stating it ordinarily from which you have had your experience,—the rivets go thru from each side or are on one side, and the caulking edge is on the other?

A. No; the caulking edge is on one side.

Q. That is on the head of the rivets?

A. No, the inside of the tank.

Q. The inside of the tank? A. Yes.

Q. If you have a construction where the rivets run both ways— A. Yes.

Q. —then you have not got a single caulking edge? A. You don't mean caulking edge.

Q. Well, caulking side?

A. Caulking condition.

Q. Caulking condition. That is, you could not have all the caulking on one side? A. No.

Q. (Continuing.) —of the bulkhead? A. No.

Q. You would have to do it on both sides?

A. Yes.

Q. And you would have to test it on both sides?

A. Yes, the same as you did on the main tanks.

Q. Yes. Now, in the test you said might have been conducted during the course of the collision repairs, would you fill both numbers 2 and 3 starboard tanks at the same time? [271] A. No.

Q. You would fill them separately? A. Yes.

Q. And test them separately? A. Yes.

Q. That would take very much longer, wouldn't it? A. Which tanks are you talking about?

Q. This is the testing of the summer tanks. If

(Testimony of A. L. Becker.)

you had to fill up one and 2 separately it would take much longer, than to do it all at one time?

A. Yes.

Q. Have you had any experience with the "Washtenaw"?

Mr. KENT.—What is the purpose of this?

Mr. SAWYER.—Testing the witness' experience.

The WITNESS.—No; I know her record.

Mr. SAWYER.—Q. You know she was converted into a whaler?

A. Yes. I knew her when she was owned by the Union Oil Company.

Q. Yes. And you know she was converted into a whaler?

A. I did not know she was sold to another oil company running in here.

Q. She was down at Los Angeles?

A. I don't know what she is doing now; is that the one that rolled over?

Q. Yes. A. Yes, she rolled over down there.

Q. And, of course, she rolled over because of a disturbance in her transverse stability?

Mr. KENT.—Just a minute.

The WITNESS.—Yes.

Mr. SAWYER.—Well, he has answered the question.

The WITNESS.—Now ask me why she was unstable transversely, to be fair, because her sluice valves in the center line bulkhead were left open. [272]

Mr. SAWYER.—Q. Well, your information and

mine differ very materially because I happened to be on that case. That is all.

Mr. KENT.—For information, Mr. Sawyer, when did that accident happen to the "Washtenaw," with reference to the "Lansing," was it before or after November 16th—

Mr. SAWYER.—Oh, it was after.

Mr. KENT.—Evidently, then, the accident referred to by you is in regard to this last-named ship. —that happened last year?

Mr. SAWYER.—Oh, sure; sure.

Mr. KENT.—Well, now, I want to ask, are you going to put in some more testimony as to the weight of the pots and kettles and so on?

Mr. SAWYER.—I am going to put in as much testimony as I have here or can get.

Mr. KENT.—Yes. Well, then I will ask leave to withdraw the witness and I am also going to interview him on the line of testimony as taken and also I am going to ask him some direct testimony.

Mr. SAWYER.—That is all right as far as I am concerned.

Mr. KENT.—If the Commissioner feels we can withdraw the witness temporarily.

The COMMISSIONER.—Yes.

TESTIMONY OF EDWARD B. EGBERT, FOR LIBELANT (RECALLED).

Testimony of EDWARD B. EGBERT, recalled as a witness on behalf of libelant, previously sworn.

Redirect Examination.

Mr. SAWYER.—Q. You are familiar, are you not, in a general [273] way with tankers on the Pacific Coast? A. Yes.

Q. Will you tell me what, if any, relation the "Lansing" bore to the ordinary tanker with respect to her construction, her riveting, her bracing, angle irons and things of that kind?

Mr. KENT.—Will you read the question, please?

(Question read by reporter.)

Mr. KENT.—All right.

The WITNESS.—She was one of the first tankers built. She is probably the poorest design of tanker that there is. The riveting instead of having the point of the rivet on one side and the caulking on the other side, it is on both sides of the bulkhead and summer tank and the expansion trunks and elsewhere. It was necessary when making the tanks tight to drive rivets, caulk rivets and weld on both sides of the bulkhead.

Q. And the same was true in the summer tanks, was it? A. Yes.

Q. Now, Mr. Egbert, where are the plans and specifications of the "Lansing," if there are any?

A. If there are any?

(Testimony of Edward B. Egbert.)

Q. Yes.

A. I don't know. They are not extant.

Q. Where are the plans, such as there are, that are extant,—in whose possession are they?

A. Bureau Veritas.

Q. Where is the Bureau Veritas located?

A. In the administration at Paris.

Q. What, if any, control has the California Sea Food Products of those plans and specifications?

A. Control?

Q. Yes. A. They have not got any. [274]

Mr. KENT.—We are not making any point, Mr. Sawyer, that you have not given us all the information you have.

Mr. SAWYER.—Well, I want the record to show that we have.

Mr. KENT.—We are not intending to argue that you have been withholding any information. I know we are trying to be frank with each other, I am sure of that.

Mr. SAWYER.—Q. Do you know of any plans or specifications of the "Lansing" that haven't been produced here that are available, from us?

A. No, there are not.

Q. Now, what effect upon the stability of the "Lansing" did the converting of the "Lansing" into a floating whale reduction factory have?

A. It makes her tender.

Q. What do you mean by "tender"? We are all laymen?

(Testimony of Edward B. Egbert.)

A. Well, she had less transverse stability than she did previous to the installation of the blubber pots, digestors, slicing machine and other superstructure on the after deck than she did before she was—than she did while she was an oil tanker.

Q. How would the transverse stability compare with the transverse stability of the tanker that Mr. Becker testified to, Union Oil tankers, did you say?

Mr. BECKER.—Associated Oil and Union Oil Company tankers.

Mr. SAWYER.—All right.

The WITNESS.—She had less stability.

Mr. SAWYER.—Q. Well, "less" is a rather vague term?

A. It has to be vague because I don't know what the stability of the Union Oil or Associated Oil tankers is. I cannot calculate the stability of the "Lansing" any more than Mr. Becker could. [275]

Q. You know, however, don't you, as a practical man, it was much more tender and ticklish?

A. Yes.

Q. Than the oil tanker that he has been testifying about? A. Yes; usually; she has less beam.

Q. And I think you have already testified that you refused to permit any testing of the summer tanks until the collision repairs were thru?

A. Yes.

Q. Have you any way of approximating, not calculating accurately, the weight of the superstructure machinery and digestors?

A. No, I don't know what it is.

(Testimony of Edward B. Egbert.)

Q. Have you any information at all of any kind that would enable you to determine the displacement, the center of gravity, the center of buoyancy of the "Lansing"? A. No, I have not.

Q. You were, however, during the time that you were representing the Bureau Veritas on the "Lansing,"—you were in immediate physical contact with the ship? A. Yes.

Q. And the testimony and opinions that you have given are based upon your knowledge of the ship?

A. Yes; not on any plans.

Mr. SAWYER.—That is all.

Recross-examination.

Mr. KENT.—Q. Then, Mr. Egbert, if you had no knowledge of the displacement, of the depth or any of the actual measurements that you have been discussing here about the "Lansing," your information and opinion is what might be termed an informed guess, just like Mr. Becker's, isn't it? [276]

A. Well, I don't think I testified in connection with anything about the stability or, at least, the transverse stability.

Q. Yes; but your opinion that you have been expressing to-day as to the crankiness of the "Lansing" and as to other matters which were brought out on direct examination by your counsel, are matters that might be termed informed judgment, like Mr. Becker's?

A. Well, in that case I had the ship and was handling the water in the tests so I knew she was tender.

(Testimony of Edward B. Egbert.)

Q. Yes. But you had no more accurate data to go on in making your decision as to how she worked, how she carried on, than Mr. Becker had in making his judgment as to what the situation was?

A. Oh, no, I have no data.

Q. You could not give us any approximation as to the weight of this additional superstructure?

A. No, I cannot.

Q. Which was put on the "Lansing." You are familiar, of course, as you say, with tankers of the character that Mr. Becker has testified to, are you not? A. Yes.

Q. Stability is determined, how?

A. By calculation in which the beam is a factor, the center of buoyancy, the center of gravity, and the displacement in each are determined by the draft.

Q. You made some statement in your examination in answer to Mr. Sawyer's question that the beam of Mr. Becker's tankers was at least wider than that of the "Lansing"? [277] A. Yes.

Q. That would then be only one factor in determining the question as to their crankiness?

A. It is a most important factor.

Q. You recognize, of course, that the draft, the depth and the other factors which you mentioned, play an important part in determining—

A. Yes.

Q. So that even should the tankers that Mr. Becker had experience with be broader of beam

(Testimony of Edward B. Egbert.)

they still might also have tender qualities due to the ratio of the depth?

A. Well, the depth is not so important as beam because in the equasion the beam is multiplied, if I remember right, by the beam squared; that is part of the equasion.

Q. In any case, these other factors would have considerable to do with the determination of the crankines of these vessels? A. Yes.

Q. Is crankiness the correct term?

A. Or stability.

Mr. SAWYER.—I have heard sailors say "ticklish."

Mr. KENT.—Q. You, of course, have in mind the fact that tankers also have a deckload and weight of various equipment on the deck?

A. No, I do not.

Q. You say you have not?

A. No, not deckloads.

Q. Well, possibly deckloads; by deckloads, I mean extra weight on the deck other than the contents of the tanks and so on, this equipment and other paraphernalia on the deck that has a tendency to add some additional weight to the ship and also has something to do with transverse stability?

A. No.

Q. Nothing of that kind? A. No.

Mr. KENT.—Thank you very much. That is all I have. [278]

(Testimony of Edward B. Egbert.)

Redirect Examination.

Mr. SAWYER.—Q. Mr. Egbert, when you say that you had no more data than Mr. Becker had, you mean mechanical data? That is to her plans and specifications?

A. Plans and specifications, yes.

Q. You certainly had the actual experience of being on the vessel and seeing her perform while the tanks were being filled, did you not? A. Yes.

Mr. SAWYER.—That is all.

Mr. KENT.—Just one more question.

Q. You had, however, no previous experience with the "Lansing" before you went on board to handle this job, did you? A. Oh, no.

(Recess.)

Mr. KENT.—I would like to ask Mr. Egbert just one more question.

Q. Mr. Egbert, there is some testimony here on page 167 when I asked you this question, this is not necessarily testimony, but we better take it down:

> "Had there been any work done on these summer tanks do you know when you made your test on them?
>
> "A. On November 15th all work was completed as far as the hulls and bulkheads were concerned. That work that remained to do at that time was the summer tanks, as far as testing was concerned."

The WITNESS.—Yes.

Mr. KENT.—Q. Does that mean what it says?

(Testimony of Edward B. Egbert.)

A. The only—I will answer first by saying "Yes," and then if I may explain— [279]

Q. I wish you would.

A. I say, is there any point you wish explained?

Q. Well, by that do you mean all of the work and testing the tanks was completed, was completed with the exception of the work that had to be done on the summer tanks?

Mr. SAWYER.—He did not say that.

Mr. KENT.—I am trying to get at it. My question was a sentence. I just want to—it is somewhat ambiguous.

Mr. SAWYER.—Well, off the record. I had the same question with him this morning.

The COMMISSIONER.—Well, now, Gentlemen, we better not proceed that way with anything off the record. Proceed.

Mr. KENT.—Q. Will you explain what you meant by that; it is somewhat indefinite, and I want to be sure that my understanding of that statement is correct.

A. Well, the work on the summer tanks remained to be done, but it was—in order to test the summer tanks we had to fill Number 2 and 3 holds, that while the work on the bulkhead was completed in the holds, that it was necessary to fill those tanks and there may have been some little caulking done coincidental with the work that was done on the summer tanks.

Q. Then my understanding is correct, that, eliminating the summer tanks now for the time being,

(Testimony of Edward B. Egbert.)

all the testing on the holds, that is, the tanks or lower tanks, had been completed before November 16, that is correct, is it not?

A. To the best of my knowledge and belief, yes.

Mr. KENT.—That is all I want. Thank you, very much.

Mr. SAWYER.—Let me ask a question on that, if you [280] have opened that up.

Mr. KENT.—Sure.

Mr. SAWYER.—Q. Do you include in that what you call the deck plate which forms the top of the tank and the bottom of the summer tank?

A. No, I do not.

Mr. KENT.—That also is clear.

Mr. SAWYER.—That is what I wanted, because I thought maybe you might construe that as being a bulkhead; but it is not a bulkhead.

The WITNESS.—That is this part here, Mr. Kent.

Mr. KENT.—Then, I understand that part that had to be tested was the bulkhead, if you want to call it that, which forms—

Mr. SAWYER.—No, don't call it a bulkhead.

Mr. KENT.—Well, it is the division which forms the bottom of the summer tank and part of the top of the tank in the hold?

The WITNESS.—Yes.

Mr. SAWYER.—That is it.

Mr. BECKER.—Call that the second deck.

The WITNESS.—The hold 'tween-deck.

(Testimony of A. L. Becker.)

Mr. KENT.—As suggested, the proper name of this division is the second deck or 'tween-deck.

Mr. SAWYER.—Or the hold 'tween-deck. We are agreed on that.

Mr. KENT.—All right. Now, then, may Mr. Becker be recalled for further direct*ion* examination by the respondent?

Mr. SAWYER.—Yes. [281]

TESTIMONY OF A. L. BECKER, FOR DEFENDANT (RECALLED).

Testimony of A. L. BECKER, recalled.

Further Direct Examination.

Mr. KENT.—Q. I will call your attention, Mr. Becker, to the testimony which has been discussed, namely, the testimony of Mr. Egbert, which is found on page 167 of the record in which a discussion of the work completed was had, which has been just referred to here. If it was the case that as far as the lower tanks or the tanks in the hold were concerned, that all that testing had been completed, and the only testing that had to be carried on was testing which related to the top, bottom or sides of the summer tanks, in your opinion would it have been necessary to fill the tank in the lower hold or the lower tanks to properly test the summer tanks? A. No, it would not.

Q. Explain that, please?

A. The second deck of the summer tank, that is, the fore-and-aft bulkhead proper and part of

(Testimony of A. L. Becker.)

the main cargo tank, as these bulkheads are invariably tested and considered part of the main cargo tank, the usual and economical method is to fill the summer tank and test only for the deck and the shell.

Q. By "shell" you mean—

A. The offside, the skin of the ship.

Q. By deck you mean what?

A. The deck over the summer tank, the main tank is aft and they let down the water or discharged the water from the main cargo tank before the inside caulking had been done on the summer tank, would [282] indicate they did not take advantage of their opportunity to accelerate the work.

Q. Is that all you have to say on that?

A. Yes.

Q. In testing a tank hull is that done with reference to filling it up and in reference to having a head of water pressure on the tank or did it have reference to an additional column of water placed above the tank in order to get greater pressure?

A. Lloyds' rules require a head pressure on the tank of 30 per cent of its depth or 8 feet above the top of the tank, that is a head pressure.

Q. Then, in order to properly test the tanks, according to your view, that is, I mean by tanks the lower tanks, the water level would have been sufficiently high and the pressure sufficiently great surrounding the summer tanks to have made the test as to that part of the summer tank to which you have just referred?

(Testimony of A. L. Becker.)

A. Yes. May I qualify that?

Q. Go ahead.

A. This ship was inspected when Mr. Egbert's society, which is the Bureau Veritas, they may have a different requirement as to head pressure, although both—

Mr. EGBERT.—(Intg.) They are substantially the same, Mr. Becker.

Mr. KENT.—Q. There was some testimony in one of the hearings as to the greater necessity of rigid tank testing on the "Lansing" than the ordinary tanker. What have you to say as to the rigidity of tank testing required for tankers—

Mr. SAWYER.—Now, I have to object to that question. If he is asked for the difference between the two classes of [283] ships he should have to show some experience with tankers converted into whaling ships. I submit there is no foundation laid at all.

Mr. KENT.—Well, my recollection of the testimony was on some interrogation propounded by Mr. Sawyer it was attempted to show that the requirements for handling and testing tanks on tankers were not rigid because, as I recall the statement, it did not amount to a great deal if there was a slight leakage between one tank and another. I want to ask him just what requirements are, in fact, necessary in testing tanks on tankers quite irrespective of the "Lansing." Now, is that clear?

Mr. SAWYER.—Yes; but you may give a matter of comparison.

(Testimony of A. L. Becker.)

Mr. KENT.—Well, I will reframe the question.

Q. I direct your testimony, Mr. Becker, solely to the rigidity of testing of tankers with reference to leakage between tanks, what is your practice and what is your custom in regard to that?

A. The test of a tank consists of examining all bulkheads under a head pressure prescribed by the qualifications of societies.

Q. And that was the head pressure that you have testified to a few minutes ago?

A, Yes, it is customarily about eight feet above the highest point of the tank.

Q. What are the requirements with regard to the tank being dry or leakage and so on?

A. The tank is usually filled and under this pressure all bulkheads are examined and are accepted to pass when dry. Miscellaneous leaks are not recognized. In qualifications of the societies they must be dry. [284]

Q. By not recognized, you mean they are not allowed?

A. They are not to be passed. Therefore, when a tank passes the qualification society it is generally understood that the head pressure showed no leaks whatever. This is the head pressure required for any tanks aboard the ship. When the vessel is in service it is apt to come in contact with docks which might ground or might be subjected to stress of heavy weather and thru some of these means may become strained and the tank may show slight leakage. This is a condition shown by all

(Testimony of A. L. Becker.)

ships and as I explained in former testimony, it is customary whenever different kinds of material are carried in adjacent tanks that these tanks be separated by a co*fer*dam, that means by pumping the leakage into the co*fer*dam so that there is no necessity for contamination of these on account of heavy stress of weather.

Furthermore, in connection with the tanker carrying nothing but fuel oil, and it was found slight leaks between the transverse bulkhead existed, the qualification society would not require docking and testing unless the leaks became so great that the safety of the ship would be in danger.

Mr. KENT.—Q. Then, as I understand from you, the test, as far as the tests are concerned, they require a dry test?

A. A test is a test, regardless of what it is to be used for.

Q. And the question of occasional leaks, that is something that has to do with the operation—

A. Yes, that is subsequent to the passing by the qualification society.

Q. After passing? A. Yes.

Q. Now, just one more question. I am going to call your attention to a statement by Mr. Egbert on page 188 that has reference [285] to specifications, particularly the statement on the specifications which were drawn or covering the work to be carried on with regard to the repairs and so on. Having in mind the fact, Mr. Becker, that time was of the essence and the work should have been done

(Testimony of A. L. Becker.)

in the quickest possible time, also having in mind the work of testing which has been testified to here, would you have included any additional specifications or other methods of handling the work?

Mr. SAWYER.—I want to object to the question on this ground. The damage claimed here consists of collision repairs and also demurrage. The collision repairs were made, apparently done to the satisfaction of the Santa Fe. The only inquiry we have here is the demurrage. I don't see how any impropriety, if it was an impropriety, in the method of making collision repairs is at all at issue in this case.

Mr. KENT.—Well, in answer, if there is any answer required to that statement, Mr. Sawyer, it is obvious that at the time the collision occurred we were faced with the question of damage, actual physical damage and possible contingent damage, and I don't suppose it is contended in any way that we had anything to do with the letting of the contract or letting the work of repairs.

Mr. SAWYER.—As a matter of fact, you had an inspector on the job all the time, according to your own testimony?

Mr. KENT.—Yes; but there is no contention, I imagine, to be made by the libelant in this case that the Santa Fe had anything to do with the work other than possibly to authorize overtime, or that we had anything to do with letting made, the contract or taking the bids or anything of that kind?

(Testimony of A. L. Becker.)

Mr. SAWYER.—Well, I submit the collision repairs have [286] been made.

Mr. KENT.—Well, that being the case, I think it would be enlightening to the court, having in mind the fact that the time of work could be reduced to a minimum, granting that the actual collision repairs have been paid, the question of reduction of work to a minimum would have a direct bearing on any possible contingent damages or demurrages and we think we are entitled to get the opinion of this witness who is admittedly an expert in his line in handling work of this kind, as to what he might have done under the circumstances to save time.

The COMMISSIONER.—Let the question be answered.

Mr. SAWYER.—Exception.

Mr. KENT.—Q. I refer you to the specifications which were prepared and submitted to the contractors by Mr. Egbert, and ask you if, having in mind the fact that time was of the essence, would you have put in any additional suggestion as to the method of carrying on the work?

A. Bids were asked from the General Engineering, Bethlehem, Hanlon and Moore as well as other shops not having dry-docks. It seems to me that these bids running very closely together, that consideration should have been given to the fact that four of these yards had dry-docks and that the testing—

Q. (Intg.) By "testing" you mean tank testing?

(Testimony of A. L. Becker.)

A. Tank testing. —could have been carried on simultaneously with the repair work provided the shipyard would have docked the vessel to do the work. If they did not wish to dock the vessel, the dock is charged for six days on the standard rate, it is less than three thousand dollars, and [287] time was in essence in the completion of the work, the job could have been completed within the time originally contemplated by the owners to put the vessel in condition.

Q. In other words, you would have ascertained the price of handling the work, each price, because the vessel was in the water, and also the price of the work on drydock? A. Yes.

Q. In both, the collision repairs and testing the tank; there could be no question about that being carried on simultaneously?

A. Yes; simultaneously, because the damage was away from the tanks; it was not in the engine-room.

Mr. KENT.—That is all.

Mr. SAWYER.—That is all, Mr. Becker. I will recall Mr. Egbert.

TESTIMONY OF EDWARD B. EGBERT FOR LIBELANT (RECALLED).

Testimony of EDWARD B. EGBERT, recalled by libelant, previously sworn:

Further Direct Examination.

Mr. SAWYER.—Q. Mr. Egbert, what have you

(Testimony of Edward B. Egbert.)

to say about the failure of those who let the contract to take into consideration the fact that some of these bidders at a higher price had a dry-dock?

A. I would not have considered it for a moment, because the people who were responsible for inspecting the damage would have questioned doing the work on the dry-dock when it could have been done off of the dry-dock.

Q. As a matter of fact, if you had accepted any of the bids from the dry-dock yards you would not have let it to the [288] lowest responsible bidder, would you? A. I would not.

Q. What have you to say—I have not the benefit of his testimony before me in writing as they had, and as I have had two on the previous hearing—you heard Mr. Becker testify to the effect that while tanks Numbers 1 and 2 were being tested full advantage was not taken of the opportunity to at the same time test a portion of the summer tank. What have you to say about that, Mr. Egbert?

A. Well, in an ordinary vessel that would have been quite true, but in the summer tanks the riveting and the connections to the tanks were so poor that when we put the test on the tank the water filled the summer tank and we could not have made a test out of it.

Mr. KENT.—The water did what?

A. Filled it; partly filled it. We would have had to go in there with gum boots.

Q. When you put the water in the tank?

A. In 1 and 2, why, the water partly filled the

(Testimony of Edward B. Egbert.)

summer tank because it leaked thru the rivet holes; it was terrible.

Mr. SAWYER.—That is all.

Mr. KENT.—One question.

Q. Mr. Egbert, as to the question of dry-docking, you never submitted the matter to the Santa Fe in any way, did you? A. No.

Mr. KENT.—That is all.

Mr. SAWYER.—Q. Mr. Egbert, at the time the bids were taken there was also a contention made that the Santa Fe was liable for demurrage, wasn't there? A. Yes. [289]

Q. And the Santa Fe strenuously resisted that contention, didn't they?

A. I am not familiar with that.

Mr. SAWYER.—You will admit they did, won't you, Mr. Kent?

Mr. KENT.—Yes, I will admit they did and I will also admit when we got down there the work was already commenced by the Eureka Boiler Works, too. The first time any representative of the Santa Fe saw the ship after the collision, the Eureka Boiler Works people were on the ship.

Mr. KENT.—Q. Isn't that correct?

A. Yes, we work fast on those matters.

Mr. SAWYER.—Q. You don't ordinarily when you are repairing collision damage waste any time, do you, in letting the contract?

A. We don't; if you waste any time looking after jobs of that kind you will get fired.

Mr. SAWYER.—That is all.

Mr. KENT.—I will recall Mr. Becker once more.

TESTIMONY OF A. L. BECKER, FOR RESPONDENT (RECALLED).

Testimony of A. L. BECKER, recalled by respondent, previously sworn:

Further Direct Examination.

Mr. KENT.—Q. You heard what Mr. Egbert said about summer tanks. What have you to say about it?

A. Well, the summer tank, it seems to me, could have been handled the same as the main transverse bulkhead.

Q. Why is that?

A. It is in the testimony that they found a leak on one side and filled the other side and found the other leak and finally got them tight. In this particular [290] case in finding a leak that would be stopped from the inside of the summer tank; as the head was raising, the water would begin to leak, stop pumping in water until such a time as that leak stopped. If it was a leak that could not be gotten at from the inside of the summer tank, plug it up; fix it temporarily so you could head the main tank up. In other words, stop all leaks due to ingress of water from the main tank. Then blow the tank down and there would be no more necessity for filling it again.

Q. Do I understand your testimony to be that if water was put into the main tank, and as the level of the water came above the bottom of the summer

(Testimony of A. L. Becker.)

tank, somebody should have been in there to plug it, to repair leaks as they appeared, Mr. Becker?

A. That is the universal way of doing it.

Mr. KENT.—That is all.

Mr. SAWYER.—I will recall Mr. Egbert once again.

TESTIMONY OF EDWARD B. EGBERT, FOR LIBELANT (RECALLED).

Testimony of EDWARD B. EGBERT, recalled by libelant, previously sworn:

Further Direct Examination.

Mr. SAWYER.—Mr. Egbert, was any such procedure as Mr. Becker testified to possible in the case of the "Lansing"?

A. It was not.

Q. Why?

A. Because the tanks were in too bad a shape.

Q. The procedure he has testified to is perfectly sound procedure, isn't it, in the case of an ordinary tanker that [291] is in service and kept up?

A. Oh, certainly; certainly.

Further Cross-examination.

Mr. KENT.—Q. The answer you have just given is based upon your opinion?

A. Well, I know it is.

Q. That is, it is your opinion, you don't know it; that is your view about it?

(Testimony of Edward B. Egbert.)

A. I don't know that the procedure is perfectly sound in another vessel?

Q. No, no; I beg your pardon. What you have reference to on the "Lansing," you said was impossible; that is your opinion?

A. Oh, I see what you mean, yes. Well, I was right there on the ship.

Mr. KENT.—That is all.

Mr. SAWYER.—I would like to ask Mr. Becker another question, Mr. Kent.

TESTIMONY OF A. L. BECKER, FOR RESPONDENT (RECALLED).

Testimony of A. L. BECKER, recalled, previously sworn:

Further Cross-examination

Mr. SAWYER.—Q. Mr. Becker, you were not present on board the "Lansing" during any of the time that the collision repairs were being made or at the time when the tanks were being tested?

A. No.

Q. You don't know a thing that happened on board that ship; you don't know anything about the condition they had to deal with, do you?

A. Except what is testified in the record.

Mr. SAWYER.—Certainly. That is all you know.

A. Yes. I have seen the "Lansing," but you are right about [292] that.

Mr. KENT.—In order—

(Testimony of A. L. Becker.)

Mr. SAWYER.—Pardon me. What was that last, the last of the last answer?

(Record read by reporter.)

Mr. KENT.—I have one question.

Q. In order that there will be no question about it, your testimony is based upon your knowledge of the operation in reference to tankers of record here? A. Yes.

Q. Is that right? A. Yes.

Mr. KENT.—That is all.

Mr. SAWYER.—That is all.

[Endorsed]: Filed Jul. 15, 1930. [293]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Walter B. Maling, Clerk of the Above-entitled Court, and to Libelant, California Sea Products Company, a Corporation, and to Messrs. Sawyer & Cluff, Proctors for Libelant:

YOU AND EACH OF YOU will please take notice that the above-named respondent, feeling aggrieved by the final decree rendered and entered in the above-entitled cause on the 17th day of November, 1930, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit.

Dated, this 19th day of November, 1930.

ROBERT BRENNAN,
H. J. LOCKWOOD,
Proctors for Respondent.

[Endorsed]: Receive copy of the within notice this 21st day of November, 1930.

SAWYER & CLUFF,
Attorneys for Libelant.

Filed Nov. 21, 1930. [294]

[Title of Court and Cause.]

RESPONDENT'S ASSIGNMENT OF ERRORS.

Comes now The Atchison, Topeka and Santa Fe Railway Company, a corporation, respondent in the above-entitled action by Robert Brennan and H. K. Lockwood, its proctors, and files the following assignment of errors upon which it will urge and rely in the prosecution of its appeal in the above-entitled cause:

1. The Court erred in awarding damages to libellant in any sum whatever for its alleged loss of six days of whale fishing, for the reason that the evidence was too uncertain, speculative and conjectural, to be made the basis of a verdict for damages, and, in support of this, respondent calls attention to the following, as shown by the evidence:

(a) That the use of a floating whaling factory was a new business or enterprise, and wholly untried;

(b) That the libellant had never before been engaged in whaling in the San Clemente waters;

(c) That there is no evidence that either the libellant or anyone else ever before had engaged in whaling operations in the San Clemente waters;

(d) That the only evidence of the probability of capturing any number of whales, within the period complained of, was the number of whales that were subsequently captured in the San Clemente waters;

(e) There was no evidence that whaling was a seasonable occupation in the San Clemente waters.

For all of the reasons above urged any damages assessed by the Court was in no way warranted by the evidence. [295]

2. The Court erred in awarding damages to libellant in any sum for its alleged loss of six days of whale fishing for the reason that, on account of there being no evidence that whaling was a seasonable occupation in the San Clemente waters, the libellant, by remaining in the San Clemente waters for a longer period of time, could have recouped its loss, if there was any loss.

3. That the Court erred in receiving or considering any evidence of the number of whales caught subsequent to the period complained of, particularly in the absence of any evidence of the number of whales caught by libellant or anyone else prior to, or at the time of, the period complained of for the reason that the Court only had the right to award damages for the interruption of an established business; and in the absence of any legal evidence of the capture of whales previous to or contempo-

raneously with the time complained of there was no just basis for the awarding of damages.

4. The Court erred in making the following finding in fact:

> "IV. That six days were consumed in making repairs of the collision damage,"

because said finding is not supported by any legal evidence.

5. That the Court erred in making the following finding of fact:

> "VI. . . . . and that Libellant was diligent in completing the tests after the collision repairs were made,"

because said finding is not supported by any legal evidence.

6. That the Court erred in making the following finding of fact:

> "VII. That Libellant used all reasonable haste in preparing the steamer "Lansing" for the intended voyage after the tests of the tanks were completed,"

because said finding is not supported by any legal evidence.

7. That the Court erred in making the following finding of fact:

> "X. That Libellant captured thirty-five whales in the waters of San Clemente Island in the month of December 1926, and sixty-seven whales in the month [296] of December, 1927."

For the reason that the same was wholly immaterial to the issues involved.

8. That the Court erred in making the following finding of fact:

> "XI. That as a result of the collision, Libellant was delayed six days in arriving on the whaling grounds in the waters of the San Clemente Island,"

because the evidence shows that the libellant is responsible for unreasonable delays in arriving in the waters of San Clemente Island, and hence said finding is not supported by any legal evidence

9. The Court erred in making the following finding of fact:

> "XII. That weather and sea conditions in the waters of San Clemente Island from the 13th day of December, 1926, until the 19th day of December, 1926, were favorable to the capture of whales,"

as this finding is not supported by any legal evidence.

10. The Court erred in making the following finding of fact:

> "XIII. That the capture of whales in the waters of San Clemente Island is a seasonable occupation,"

for the reason that the only evidence in support of this finding, aside from the number of whales actually caught, is the testimony of F. K. Dedrick, President and General Manager of Libellant, wherein he said:

> "Down here off San Clemente and Southern California you can operate the whole winter if

you want to, if you find any whales down there." (Tr., p. 25).

11. The Court erred in making the following finding of fact:

"XIV. That during the period from December 13, 1926, until December 19, 1926, Libellant could, with reasonable certainty, have captured six whales in the waters of San Clemente Island,"

for the reason that there is no evidence that either libellant or anyone else were ever engaged in whaling in the waters of [297] San Clemente Island at any time previous to December 13, 1926.

Dated, November 28, 1930.

Respectfully submitted,
ROBERT BRENNAN,
H. K. LOCKWOOD,
Proctors for Respondent and Appellant.

[Endorsed]: Received copy of the within assignment of errors this first day of December, 1930.

SAWYER & CLUFF,
Attorneys for Libelant.

Filed Dec. 1, 1930. [298]

[Title of Court and Cause.]

STIPULATION AND ORDER RE ORIGINAL EXHIBITS ON APPEAL.

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the re-

spective parties hereto, that all exhibits of all parties introduced in evidence upon the trial of the above-entitled cause in the District Court before United States Commissioner Francis Krull need not be reproduced in the record on appeal, but may be transmitted to the Circuit Court of Appeals for the Ninth Circuit in their original form, and may be used by either party on the argument of said appeal with the same force and effect as if said exhibits were copied in the Apostles on Appeal.

Dated: December 2d, 1930.

ROBERT BRENNAN,
Proctor for Respondent Appellant.
SAWYER & CLUFF,
Proctors for Libelant.

ORDER.

In accordance with the foregoing stipulation, IT IS HEREBY ORDERED that the exhibits in said stipulation refererd to may be sent up in connection with the appeal prosecuted herein, as original exhibits, to the Circuit Court of Appeals for the Ninth Circuit instead of being copied in the Apostles on Appeal.

A. F. ST SURE,
Judge of the United States District Court.

Order signed December 4, 1930.

[Endorsed]: Filed Dec. 4, 1930. [299]

[Title of Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of Said Court:

Sir: Please prepare apostles on appeal in accordance with rule 4 U. S. Circuit Court of Appeals, Ninth Circuit.

ROBERT BRENNAN (Signed),
H. K. LOCKWOOD (Signed),
Attorneys for Respondent.

[Endorsed]: Filed Nov. 26, 1930. [300]

[Title of Court.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 300 pages, numbered from 1 to 300, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of California Sea Products Co., a Corp., vs. The Atchison, Topeka and Santa Fe Railway Co., No. 19,403, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Ninety-four Dollars ($94.00), and that the said amount has been paid to me by the attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 20th day of December, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [301]

[Endorsed]: No. 6341. United States Circuit Court of Appeals for the Ninth Circuit. The Atchison, Topeka and Santa Fe Railway Company, a Corporation, Appellant, vs. California Sea Products Company, a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 20, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6341

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

The Atchison, Topeka and Santa Fe Railway Company, a corporation,
Appellant,

vs.

California Sea Products Company, a corporation,
Appellee.

APPELLANT'S BRIEF.

ROBERT BRENNAN,
H. K. LOCKWOOD,
Proctors for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

No. 6341

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

The Atchison, Topeka and Santa Fe Railway Company, a corporation,
Appellant,

vs.

California Sea Products Company, a corporation,
Appellee.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

(Figures in brackets refer to pages of the Apostles. Italics are ours unless otherwise noted.)

The appellant is a corporation organized and existing under and by virtue of the laws of the state of Kansas and is, and was at the times named in appellee's libel, a common carrier, engaged in interstate and intrastate commerce, and was the owner of a certain tugboat called "A. H. Payson," which was operated on San Francisco Bay and perhaps elsewhere. That on November 16, 1926, said tugboat collided with the appellee's steamer named "Lansing" while said steamer was moored at a berth

on the south side of pier No. 46 on the water front of San Francisco Harbor, causing certain damages to the steamer "Lansing." [Apost. p. 51.]

That the appellee for some time prior to November 16, 1926, the exact time being uncertain, was a corporation engaged in whaling on the high seas; that in its whaling operations and at all times prior to November 16, 1926, the appellee would take its captured whales ashore and render them into salable products at two land stations located at Monterey, California, and Trinidad, California. However, in June, 1926, the appellee purchased an old oil tanker from the Union Oil Company, having conceived the idea of converting this oil tanker into a floating whaling factory for the purpose of rendering the captured whales into salable products while at sea, by using the said converted oil tanker as a whaling factory. At no time prior to November 16, 1926, had the appellee ever used a floating whaling factory. [Apost. p. 77.]

Upon the completion of the "Lansing" into this floating whaling factory it was contemplated by the appellee to take the said "Lansing," accompanied by certain smaller "killer" boats, down to the waters off San Clemente Island for the purpose of fishing for whales and, if any were captured, to render the same into salable products by the use of the new floating factory. [Apost. pp. 64, 65, 82.]

On November 16, 1926, the work of converting the oil tanker "Lansing" into this floating whaling factory was nearly completed. The only work remaining to be done was the testing out of certain tanks therein and

for that purpose she was docked alongside the aforesaid pier in San Francisco Bay, and was in said uncompleted condition and at said place when she was rammed and damaged by the appellant's tugboat as aforesaid.

The appellee arrived in the San Clemente waters with the "Lansing" and "killer" boats on December 19, 1926, and claims that, had it not been for the collision, appellee would have arrived there six days earlier, or on December 14, 1926. [Apost. p. 158.]

As a result of this collision the appellee filed a libel against the appellant in this case, claiming damages for repairs and detention of the vessel.

That as a result of this collision certain repairs were made necessary to the steamer "Lansing," which repairs were effected at a cost of $3,554.09. [Apost., p. 5.]

The repairs to the vessel, made necessary on account of the collision, were completed on November 22nd, 1926, six days having been required to effect them. [Apost. pp. 104, 107.]

That thereafter and on October 17, 1927, the appellant and appellee entered into a stipulation in writing that the said collision was due to the sole fault of the tugboat "A. H. Payson," owned by the appellant, and said stipulation further provided that appellee have and recover from the appellant whatever damages, if any, that were sustained by reason of said collision. [Apost., p. 7.] And said appellant, in accordance with said stipulation, paid the aforesaid cost of repairs, in the sum of $3,554.09, receipt of which was duly acknowledged by the appellee. [Apost., p. 5.]

That on the 18th day of October, 1927, there was made and filed herein an interlocutory decree, based upon the aforesaid stipulation, wherein it was specified that the collision was due to the sole fault of appellant's tugboat "E. H. Payson," and that the appellee should have and recover from the appellant whatever damages, if any, it sustained by reason of the matters alleged in the libel, together with interest and costs, and further providing that Francis Krull, Esq., United States Commissioner, should ascertain and compute the amount due to libellant in the premises and to report the same to the court. [Apost., p. 8.]

REPORT OF SPECIAL MASTER.

Thereafter, and on July 15, 1930, the said Francis Krull, special Master, filed his report awarding the appellee the sum of $1,870.48, as demurrage, being the profits on six whales, which said Special Master found the appellee would have captured, with reasonable certainty, during the time that the steamer "Lansing" was laid up for the repairs aforesaid. [Apost., p. 14.]

That exceptions to the report of Special Master Francis Krull were duly made and filed by the appellant. [Apost. p. 18.] Whereupon the court ordered that said exceptions be overruled and the Commissioner's report was duly confirmed [Apost. p. 28], appellant excepting thereto.

Thereafter and on November 17, 1930, the court made and entered its final decree herein, based upon the report of Special Master Francis Krull, and by the terms of said decree awarded the appellee damages in the sum of $1,870.48, with interest and costs. [Apost. p. 36.] All of which was duly excepted to.

THE APPEAL.

is from the final decree of judgment of the United States District Court for the Northern District of California, Southern Division, made and entered on the 17th day of November, 1930, awarding appellee damages in the sum of $1,870.48, together with interest and costs, as demurrage alleged to have been due appellee on account of the detention of appellee's steamer "Lansing" to undergo repairs, occasioned through appellant's negligence.

THE CONTROVERSY.

arises on account of the claim of appellee that its steamer "Lansing", and accompanying "Killer" boats, were delayed, by reason of the collision, six days in starting on a whale fishing expedition in the San Clemente waters, and, consequently, lost the profits of six days fishing; whereas, the appellant contends that such claimed profits were too speculative, conjectural and remote, under the uncontradicted evidence, to be the subject of legal damages, and that appellee's proposed whale fishing expedition was, in fact, a new venture and undertaking and that no established business or occupation of appellee was interrupted.

Thereafter the appellant made and filed its assignment of errors [Apost. p. 358], which are relied upon in this appeal.

APPELLANT'S ASSIGNMENT OF ERRORS.

I.

The court erred in awarding damages to libellant in any sum whatever for its alleged loss of six days of whale fishing, for the reason that the evidence was too uncertain, speculative and conjectural, to be made the basis of a verdict for damages, and, in support of this,

respondent calls attention to the following, as shown by the evidence:

(a) That the use of a floating whaling factory was a new business or enterprise, and wholly untried;

(b) That the libellant had never before been engaged in whaling in the San Clemente waters;

(c) That there is no evidence that either the libellant or anyone else ever before had engaged in whaling operations in the San Clemente waters;

(d) That the only evidence of the probability of capturing any number of whales, within the period complained of, was the number of whales that were subsequently captured in the San Clemente waters;

(e) There was no evidence that whaling was a seasonable occupation in the San Clemente waters.

For all of the reasons above urged any damages assessed by the court was in no way warranted by the evidence. [Apost. pp. 358-359.]

II.

The court erred in awarding damages to libellant in any sum for its alleged loss of six days of whale fishing for the reason that, on account of there being no evidence that whaling was a seasonable occupation in the San Clemente waters, the libellant, by remaining in the San Clemente waters for a longer period of time, could have recouped its loss, if there was any loss. [Apost. p. 359.]

III.

That the court erred in receiving or considering any evidence of the number of whales caught subsequent to

the period complained of, particularly in the absence of any evidence of the number of whales caught by libellant or anyone else prior to, or at the time of, the period complained of, for the reason that the court only had the right to award damages for the interruption of an established business; and in the absence of any legal evidence of the capture of whales previous to or contemporaneously with the time complained of, there was no just basis for the awarding of damages. [Apost. p. 359.]

VII.

That the court erred in making the following finding of fact:

> "X. That libellant captured thirty-five whales in the waters of San Clemente Island in the month of December, 1926, and sixty-seven whales in the month [296] of December, 1927."

For the reason that the same was wholly immaterial to the issues involved. [Apost. p. 360.]

IX.

The court erred in making the following finding of fact:

> "XII. That weather and sea conditions in the waters of San Clemente Island from the 13th day of December, 1926, until the 19th day of December, 1926, were favorable to the capture of whales."

as this finding is not supported by any legal evidence. [Apost. p. 361.]

X.

The court erred in making the following finding of fact:

> "XIII. That the capture of whales in the San Clemente Island is a seasonable occupation,"

for the reason that the only evidence in support of this finding, aside from the number of whales actually caught, is the testimony of F. K. Dedrick, president and general manager of libellant, wherein he said:

> "Down here off San Clemente and Southern California you can operate the whole winter if you want to, if you find any whales down there." [Apost. p. 361.]

XI.

The court erred in making the following finding of fact:

> "XIV. That during the period from December 13, 1926, until December 19, 1926, libellant could, with reasonable certainty, have captured six whales in the waters of San Clemente Island."

for the reason that there is no evidence that either libellant or anyone else were ever engaged in whaling in the waters of [297] San Clemente Island at any time previous to December 13, 1926. [Apost. p. 362.]

POINTS AND AUTHORITIES RELIED ON BY APPELLANT FOR REVERSAL.

I.

Demurrage or damages for the loss of profits in the use of a vessel pending repairs, arising from a collision, are allowable only when profits have actually been lost, or may reasonably be presumed to have been, and only when the amount of such profits is proved with reasonable certainty.

Cuyamel Fruit Co. et al. v. Nedland et al., 19 Fed. (2nd) 489;

The Conqueror, 166 U. S. 110, 41 L. Ed. 937;

The Winfield S. Cahill, 258 Fed. 318;

Aktieselskapet Bonheur v. San Francisco & P. S. S. Co., 287 Fed. 679;

The North Star, 151 Fed. 168;

Boston & Albany R. R. Co. v. O'Reilly, 158 U. S. 334, 39 L. Ed. 1006;

Central Coal & Coke Co. v. Hartman, 11 Fed. 96;

M'Cormick v. United States Mining Co., 185 Fed. 748;

Swift & Co. v. Johnson, 138 Fed. 867;

Homestead Co. v. Des Moines Electric Co., 248 Fed. 439;

Malone v. Hastings, 193 Fed. 1;

Gibson v. Hercules Mfg. etc. Co., Inc., 80 Cal. App. 689;

Blankenship v. Lanier (Ala.), 101 So. 763;

Carolene Sales Co. v. Canyon Milk Products Co. (Wash.), 210 Pac. 366;

Schulz v. Gether, 198 N. W. 433.

II.

It is the legal duty of one who claims a loss of profits for the use of a vessel pending repairs, arising from a collision, to use due diligence to reduce the amount of the alleged damages.

The Mascot, 282 Fed. 766;

Penn. R. R. Co. v. Washburn et al. (D. C.), 50 Fed. 335;

The Oregon, 55 Fed. 666, 673, 5 C. C. A. 229;

Wicker v. Hoppock, 73 U. S. (6 Wall.) 94, 99, 18 L. Ed. 752;

Warren v. Stoddart, 105 U. S. 224, 229, 26 L. Ed. 1117.

THE ARGUMENT.

At the outset let us call the court's attention to the fact that there is no material conflict in the evidence covering any point raised in this brief, with this explanation, that there is a slight conflict in the evidence as to the sea and weather conditions in the San Clemente waters at the time in controversy. This, however, in our opinion, is not substantial, neither is it controlling.

Practically the entire record is devoted to the question of whether or not the appellee procured the repairs to the damaged steamer "Lansing" as expeditiously as was reasonably possible, and whether, after the repairs were completed, the appellee's vessel put to sea and arrived at the whaling grounds as quickly as was reasonably possible, and without unnecessary delay. There was a hopeless conflict in the evidence relating to these two matters and, for that reason, we will assume, on this appeal, that the findings of the trial court are conclusive as to (a) repairs having been made as expeditiously as reasonably possible, and (b) that the appellee took its steamer "Lansing" to sea and to the whaling waters without unnecessary delay after the repairs were perfected.

We will rely, therefore, in this appeal, on error No. 1 [Apost. p. 358]; error No. 2 [Apost. p. 359]; error No. 3 [Apost. p. 359]; error No. 7 [Apost p. 360]; error No. 9 [Apost. p. 361]; error No. 10 [Apost. p. 361]; error No. 11 [Apost. p. 362].

A New Floating Whaling Factory.

The prospective profits that would have been earned by appellee in fishing for whales in the San Clemente waters, during the time that the vessel was detained for repairs, were entirely too speculative, conjectural and remote to be the subject of legal damages, because, in the first place, the appellee was going to put into use an entirely new floating whaling factory.

The "Lansing" was purchased by the appellee in June, 1926, from the Union Oil Company. It was an old tanker and had been used by the Union Oil Company for many years. The "Lansing" was not only a very old vessel but also of very poor design. As said by E. B. Egbert, one of appellee's witnesses: "She was one of the first tankers built. She is probably the poorest design of tanker that there is." [Apost. p. 335.]

The work of converting the vessel into a floating factory was done in the Bethlehem shipyards, and the work commenced thereon September 16, 1926. New machinery was installed in it for the purpose of fitting it up as a floating reduction plant.

At the time of the collision the three tanks aft on the "Lansing" had been completed and had been fully tested, but the three tanks forward were in the process of being tested, and the work was not finished at the time of the collision. [Apost. pp. 40, 103.] In other words, at the time of the collision the "Lansing" had not been completely converted from a tanker to a floating whaling factory. [Apost. pp. 43, 44, 45, 49, 53.] In converting this steamer into a floating whaling factory the appellee

was placing 16 boilers or digesters in the vessel for the purpose of cooking the whale meat, blubber and bone. [Apost. p. 44.]

Prior to that time, the appellee's whaling business was conducted through the agency of what are termed killer tugs which went out and captured the whales and brought them to land stations for reduction, that is, to stations situated on land, where the manufacture of whale oil and other products was carried on. [Apost. pp. 38, 43, 53, 58, 63, 89, 101.] Let it be noted that never before had the appellee used either this floating whaling factory or any other similar floating factory. This is demonstrated by the following testimony:

> "Q. Had you ever been employed on any tankers before? A. No, not before.
>
> Q. And had you ever had any experience in the handling of a floating factory like this before? A. No, sir." [Apost. p. 77.]

Starting out on a whaling voyage with an entirely new outfit, the like of which had never before been used by appellee, made the outcome of the expedition a matter of pure speculation.

New Arrangement Wholly Untried.

The loss of prospective profits was further highly speculative because of the fact that this new floating whaling factory, after being built, first had to be tried out to ascertain whether it would work. At the time of the collision it was still necessary to test and repair the bulkheads, as above noted, after which the vessel would be loaded with water, fuel oil and coal. It was also contemplated that the

new machinery placed in the steamer would be tried out by procuring a whale *somewhere*, putting it through the equipment. [Apost. pp. 46, 84, 95, 96, 99.] This is shown by the following testimony:

> "We put on board a lot of new machinery,—cookers, slicers, conveyors, pipes and so forth, and our program was this from the beginning: That as soon as we had this equipment installed and ready for operation in San Francisco we would send one of our whalers outside of the Farallones or Point Reyes and bring in a whale and put that whale thru our equipment to see if every thing worked all right before we went to the whaling grounds. That was our intention right along and that is what we did [Testimony of F. K. Dedrick]; while we were waiting for the coal to be resacked we went to California City and waited there three or four days, waiting for a whale. We had sent the 'Hawk' out to bring in a whale and we were waiting there for the whale to be brought in.
>
> Q. And you sent the 'Hawk' out in due course of time and got [61] the whale? A. Well, she didn't bring it in, because she didn't get any; and it was too expensive to lay her up there too long, to lay the 'Lansing' up there too long, so we got ready and went to sea without trying the machinery out." [Apost. pp. 66, 67.]

Although the appellee attempted for three days to capture a whale in the vicinity of California City, none was found. [Apost. p. 80.] The purpose of this proposed trial was to test out the reduction machinery. [Apost. p. 75.]

Inasmuch, therefore, as no test of the new floating whaling factory had been made, prior to the arrival in the San Clemente waters, the success of the undertaking was still more dubious.

Fishing in New Waters.

Another element of speculation entered into the undertaking because of the fact that never before had the appellee fished for whales in the San Clemente waters. Whenever whale fishing had been undertaken, theretofore, when operating to and from appellee's two land stations, the waters of San Clemente Island had not been included in its territory. There had been no data derived from appellee's fishing, in either these or similarly situated waters, from which it could be ascertained, with any reasonable degree of certainty, that whales could be found there. Furthermore, there was no evidence that anyone else ever fished for, or captured, whales in the San Clemente waters. In all the whale fishing expeditions, numerous as they no doubt were upon the high seas, no record was found where anyone had ever fished for whales in the San Clemente waters. The undertaking, therefore, on account of the venture into new and untried waters, made the expedition highly problematical.

Weather and Sea Conditions Problematical.

As to whether weather and sea conditions in the waters of San Clemente were favorable for the capture of whales from December 13th to December 19th, is wholly a matter of conjecture.

The appellee offered some testimony purporting to show the wind and weather conditions in the San Clemente waters covering this period, but such evidence was of no probative value. The observations as to these conditions were made at Point Arguella. [Apost. p.

125.] The nearest approach to similarity between conditions at Point Arguella and San Clemente waters was given by the testimony of observer Thomas R. Reed, who said he thought that "conditions prevailing at Point Arguella, as bearing upon the likelihood of similar conditions prevailing at the southern point of San Clemente Island and the waters off the southern part of San Clemente Island would reflect wind conditions *to a degree.*" [Apost. p. 127.] Then he gave the velocity of the wind, according to observations made at Point Arguella, during the six day period. Among these observations let it be noted that on the afternoon of December 15th, he found the wind was blowing 28 miles an hour, and on December 18th, from 22 to 30 miles an hour, and on December 19th, from 18 to 36 miles an hour. [Apost. pp. 128, 129.] Appellee's witness Dedrick testified that you can fish for whales with a wind velocity around 20 miles per hour, but clearly implied that whale fishing could not be carried on with a higher wind velocity, at least not unless the fishing boat happened to be in the shelter "or the lea side of an island." [Apost. pp. 159, 160.] Let it be observed that Point Arguella is situated "slightly to the west of Point Conception, which is the point jutting out into the ocean at the dividing line between what we call Northern and Southern California." [Apost. p. 129.] Point Arguella, therefore, is somewhat between 100 and 150 miles north of the San Clemente waters. [Apost. p. 129.] Let it be noted, further, that these observations made at Point Arguella were *land* observations, and the witness Thomas R. Reed truthfully said: "If you go out west it is conceivable

that you might have a storm at sea while the winds have not yet reached the coast at all." [Apost. p. 131.] And then Mr. Reed made a very pertinent observation in testifying: "One of our troubles in the Weather Bureau is the fact that there isn't enough ships. I have turned over a number of reports without finding one with a ship's report on it." [Apost. p. 132.]

Appellee's witness F. K. Dedrick testified that "If it is too rough you can't chase whales." [Apost p. 145.] And admitted that on December 19th, when the wind at Point Arguella was above thirty miles an hour, that it was impossible to carry on whale fishing. [Apost. p. 146.] However, the witness Dedrick stated what is obviously true, that the real factor, in determining whether the weather conditions were favorable to sea fishing, was, not the wind velocity, but rather *the condition of the sea.* He stated that if the water is "choppy" fishing cannot be carried on. Then Mr. Dedrick admitted that the wind conditions on land do not, necessarily, determine the condition of the waters of the ocean, when he said: "You may have big sea sometimes, and a long swell that don't hurt you at all, and it may be deal calm and still have that long swell. Then you may have only a sharp break and it will be choppy and hard to pursue whales, and hard to handle." [Apost p. 159.] He further testified "some times you will have a big sea and no wind, sometimes when it is blowing a long ways offshore." [Apost. p. 166.]

It appears, therefore, from the foregoing testimony, that whether the sea condition at San Clemente Island was favorable for whale fishing, during these six days, was highly problematical and speculative. It does appear, positively, from this record, that on at least three of these days the sea conditions were most unfavorable, on account of the high wind.

The Number of Whales Captured Subsequent to December 19th, 1926, Was of No Probative Value.

The evidence is wholly insufficient to sustain the finding that the appellee would, with reasonable certainty, have captured six whales between December 13th, 1926, and December 19, 1926. The theory of the appellee was stated by Proctor Sawyer, as follows:

> "Now, if Your Honor please, we have some statistical data showing the whales that actually were caught after they arrived at the southern end of San Clemente Island, and upon the basis of that data we have compiled the cost per whale and the revenue per whale, and on the basis of that data we have ascertained the average daily catch of whales. We propose to use that figure for the purpose of estimating the catch that would have been made during the preceding six days [130] had we been there." [Apost. p. 148.]

Then Proctor Sawyer further stated:

> "We are going to compare that with our experience in other years, when they were there earlier, showing what conditions were; that is the only way we can get at it." [Apost. p. 168.]

It will be observed, however, in the record, that the appellee never fished for whales in the San Clemente waters prior to this time and that the only time that appellee ever fished there, other than the time complained of, was a year subsequent thereto. The only time appellee ever fished in the San Clemente waters before December 19, was *in the following year* of 1927. [Apost. p. 170.]

The only thing, therefore, that appellee has in the record that tends to prove, even in a remote manner, the probability of any catch of whales between December 13th and December 19th, 1926, is the tabulated record of

whales that were *subsequently caught* in the San Clemente waters. This tabulation is found on pages 190 to 211 of the Apostles. It shows the catch of whales beginning December 19, 1926, and ends with the date of January 14, 1928. The appellant claims that this record of whales caught, *subsequent to the period complained of,* is immaterial, irrelevant and incompetent, and is of no probative value to establish the fact that any particular number of whales would be captured between December 13th and December 19, 1926, with any degree of certainty. It will be noted that no whales were captured on December 19, 1926, December 22nd, 1926, December 24, 1926 [Apost. p. 190], Jan. 2, 1927, Jan. 3, 1927 [Apost. p. 192], Jan. 21, 1927 [Apost. p. 195], Jan. 29, 1927, Jan. 30, 1927 [Apost. p. 197], Dec. 6, 1927 [Apost. p. 205], Dec. 18, 1927 [Apost. p. 207], Dec. 21, 1927, Dec. 24, 1927, Dec. 25, 1927 [Apost. p. 208], Dec. 29, 1927, Dec. 30, 1927, Dec. 31, 1927, Jan. 2, 1928, Jan. 4, 1928 [Apost. p. 209], Jan. 7, 1928, Jan. 10, 1928, Jan. 11, 1928, Jan. 12, 1928 [Apost. p. 210], Jan. 14, 1928 [Apost. p. 211].

This record, therefore, shows conclusively that the appellee had no established business that was interrupted by the detention of the vessel on account of the collision.

Whales Not Uniform in Size.

Another difficulty that confronted the appellee, and made the fishing expedition wholly and purely speculative, was that it was impossible to determine, even if whales should be caught, what the size of the whales would be. This is readily observed from the following testimony:

"Mr. Kent: Q. Do those whales vary per whale, that is, the heaviest whale and the lightest whales would vary approximately how many barrels?

Captain Dedrick: Sometimes we get one that won't go ten barrels, and then we get some that go sixty barrels. You see, we have taken an average.

Mr. Kent: I understand from the captain now that they would run anywhere from ten to fifty barrels?

Captain Dedrick: Yes, sometimes sixty." [Apost. p. 179.]

Appellee Was Engaged in a New Undertaking, Wholly Untried.

Some time prior to the date of the damage to the "Lansing", which was on November 16, 1926, the appellee had been in the business of capturing whales and reducing them into products to be sold. Just what waters the appellee frequented, in its pursuit of whales, is not clear. It is clear, however, that after whales were captured they were brought to land and rendered into saleable products from two land stations. But, in September, 1926, the appellee conceived the idea of having the tanker "Lansing" converted into a floating whaling factory. This was a new undertaking. Never before had the appellee made any attempt to convert the whales into saleable products at sea. The results to be obtained in this new venture were speculative to the highest degree. The appellee had never had any experience of a like nature to guide it. It might be a success and it might be a failure. But, which ever it turned out to be there were no precedents. It was a venture upon an unknown sea. While the appellee's experience in rendering saleable products out of whales

from its land factories served to guide it, in somewhat of a general way, it well knew that the conditions would not be the same in the new venture. In the floating whaling factory new conditions were to be met with that had never confronted appellee before. Necessarily there would be a consideration of matters that had never occurred to appellee before. It was wholly a new undertaking, a radical departure from the accustomed practice.

Another new feature to this new undertaking, and of even greater importance than the one just considered, is the fact that the appellee proposed to fish for whales in new waters. Appellee never fished in the San Clemente waters before December 19th, 1926. It was without experience there, and consequently without precedents. It was not known whether it would be able to catch any whales in that locality, based upon its own experience there. Appellee had no idea whether it would be able to catch one whale a day, ten whales a day or no whales at all, based upon its own experience, because it had had no experience there. Appellee's experience there was wholly *infuturo*. This circumstance, therefore, rendered this new undertaking still more speculative and problematical.

Furthermore, there is no evidence in the record that anyone else ever captured whales, or even fished for whales, in the San Clemente waters prior to December 19, 1926. There was, therefore, no available data from which it could be calculated that the appellee had any reasonable probability of capturing whales in those waters.

From a consideration of these factors we are pressed to the inevitable conclusion that this was wholly a new under-

taking, without precedent and wholly speculative in character. We submit, from a consideration of the above, that the appellee had no regular and established business of catching whales, or rendering its products from a floating whale factory, in the San Clemente waters, and that, consequently, any loss of profits, on account of losing these six days' fishing, could not be ascertained, in the absence of available data. We submit that this new venture was dependent upon such numerous and uncertain contingencies that the speculative profit therefrom was not susceptible of proof with any reasonable degree of certainty. We submit that profits that are thus speculative, remote and uncertain may not form the basis of a lawful judgment. The destruction or interruption of an established business is one thing, but to be prevented and delayed from embarking in a new business and undertaking is quite another thing. We submit that the facts here puts the appellee in the latter class and that, as a consequence thereof, the appellee was not entitled to judgment for the loss of any speculative profits.

Where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation.

For a leading case covering the above and well established legal proposition we invite the particular attention of this Honorable Court to the extremely well considered opinion of Judge Sanborn, in *Central Coal & Coke Company v. Hartman,* 111 Fed. 96, quoted at length hereafter.

AUTHORITIES.

In *Cuyamel Fruit Co. et al. v. Nedland et al.,* 19 Fed. (2nd) 489, the court said:

> "Demurrage or damages for the loss of profits or of the use of a vessel pending repairs, arising from a collision, are allowable only when profits have actually been, or may reasonably be supposed to have been, lost, and the amount of such profits is proved with reasonable certainty."

In *The Nantasket,* 290 Fed. 813, the court said:

> "'It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certainty.' 166 U. S. 125, 17 Sup. Ct. 516, 41 L. Ed. 937. 'The difficulty is in determining when the vessel has lost profits and the amount thereof.' 166 U. S. 127, 17 Sup. Ct. 516, 41 L. Ed. 937. 'It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel.' 166 U. S. 133, 17 Sup. Ct. 519, 41 L. Ed. 937. 'In other words, there must be a loss of profits in its commercial sense.' 166 U. S. 133, 17 Sup. Ct. 519, 41 L. Ed. 937. * * * It has been the general understanding in this country, I think, that damages for detention are not recoverable in collision cases without proof of actual pecuniary loss caused thereby. The Saginaw (D. C.), 95 Fed. 703; The Loch Trool (D. C.), 150 Fed. 429; Fisk v. City of New York (D. C.), 119 Fed. 256; The Mayflower, Fed. Cas. No. 9,345."

In *The Conqueror,* 166 U. S. 110, 41 L. Ed. 937, the Supreme Court of the United States said:

> "The mere opinion of witnesses, unfortified by any data, as to what the earnings would probably

have been, is usually regarded as too uncertain and conjectural to form a proper basis for estimation, though in a few cases they seem to have been received. The damages must not be merely speculative, and something else must be shown than the simple fact that the vessel was laid up for repairs."

In *The Winfield S. Cahill*, 258 Fed. 318, the court said:

"Damages for loss of use cannot be awarded because the injured vessel might have made some profit. The question is not of the possibility of employment, but of actual loss; not what possibly could have been made, but what would have been made."

In the *Aktieselskapet Bonheur v. San Francisco & P. S. S. Co.*, 287 Fed. 679, the court said:

"Where the damages alleged to have been sustained in the interim of detention arise by reason of loss of earnings, the inquiry is not whether they could possibly have been made by the use of the vessel, but whether they would have been made. * * *

"The authorities seem to lead to but the one conclusion, that damages for loss of the use of a vessel while undergoing repairs made necessary by collision will only be allowed when it is shown that she could have been profitably employed during the period of her detention for repairs. The Loch Trool (D. C.), 150 Fed. 429."

In *The North Star*, 151 Fed. 168, the court also said:

"The inquiry is determined by the same rules of law which obtain when the owner of any other kind of property seeks compensation for the profits lost by the wrongful interruption of its use."

We will now refer to a few of such cases.

In *Boston & Albany R. R. Co. v. O'Reilly*, 158 U. S. 334, 39 L. Ed. 1006, the Supreme Court of the United States, speaking through Mr. Justice Shiras, said:

"It is equally obvious that the fate of a new venture was merely conjectural. Such evidence is too uncertain to be made the basis of a verdict for damages."

In *Central Coal & Coke Co. v. Hartman,* 111 Fed. 96, Judge Sanborn announces this rule as follows:

"Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages. Now, the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. Howard v. Manufacturing Co., 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147; Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co., 152 U. S. 200, 205, 14 Sup. Ct. 523, 38 L. Ed. 411; Trust Co. v. Clark, 92 Fed. 293, 296, 298, 34 C. C. A. 354, 357, 359; Simmer v. City of St. Paul, 23 Minn. 408, 410; Griffin v. Colver, 16 N. Y. 489, 491, 69 Am. Dec. 718. There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established busi-

ness may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly income he derives from it for a long time before, and for the time during the interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff has lost. One, however, who would avail himself of this exception to the general rule, must bring his proof within the reason which warrants the exception. *He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced.* 1 Sedg. Dam. 183; Red v. City Council, 25 Ga. 386; Kenny v. Collier, 79 Ga. 743, 8 S. E. 58; Greene v. Williams, 45 Ill. 206; Hair v. Barnes, 26 Ill. App. 580; Morey v. Light Co., 38 N. Y. Super. Ct. 185. And one who seeks to recover for the loss of the anticipated profits of an established business *without proof of the expenses and income of the business for a reasonable length of time before as well as during the*

interruption is in no better situation. In the absence of such proof, the profits he claims remain speculative, remote, uncertain, and incapable of recovery. In Goebel v. Hough, 26 Minn. 252, 258, 2 N. W. 847, 849, the supreme court of Minnesota said:

'When a regular and established business, the value of which may be ascertained, has been wrongfully interrupted, the true general rule for compensating the party injured is to ascertain how much less valuable the business was by reason of the interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are.'

The truth is that *proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import is indispensable to a lawful judgment for damages* for the loss of the anticipated profits of an established business. Goebel v. Hough, 26 Minn. 252, 256, 2 N. W. 847; Chapman v. Kirby, 49 Ill. 211, 219; 1 Sedg. Dam. 182; Ingram v. Lawson, 6 Bing. N. C. 212; Shafer v. Wilson, 44 Md. 268, 278."

This opinion by Judge Sanborn is a leading case on the principle announced.

In *Gibson v. Hercules Mfg. etc. Co., Inc.* 80 Cal. App. 689, the Court of Appeal of California has this to say:

"There is, however, another matter which goes to the very vitals of this action and precludes the possibility of plaintiff's recovery, which is best stated in section 118, 17 C. J., page 797: *'Where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business,* and its profits are speculative

and remote, existing only in anticipation.' The paragraphs of the complaint which we have copied show that no business has ever been transacted, that no locks have ever been manufactured and no locks have ever been sold. The alleged loss of profits relates *not to the interruption of the business of a going concern*, but is remote, contingent, speculative, existing only in anticipation, without any tangible basis upon which to predicate any loss whatever. The allegation that the plaintiff *could have done this and could have done that*, if the defendant had done something else, furnishes no facts upon which to predicate a judgment. The past profits of a going concern, if any, may be ascertained when its business is interrupted, *but the fact of profits to be realized from a business about to be launched can exist only on paper* and while profits may be possible, losses in the enterprise are just as possible, and in either case, *they are nothing more than contingent probabilities.* In California Press Mfg. Co. v. Stafford Pack. Co., 192 Cal. 479 (32 A. L. R. 114, 221 Pac. 345), the Supreme Court of this state says: 'As a proposition of law it is well established that loss of profits growing out of a breach of contract, and resulting to an unestablished business, is of too uncertain a character to constitute a basis for the computation of damages for the breach. Kettering v. Sheppard, 19 N. M. 330 (142 Pac. 1128). *Where a new business or enterprise is engaged in, and damages by way of profits are sought for its interruption or prevention, the rule is that they will be denied, for the reason that such business is an adventure as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation.* (17 Cor. Jur. p. 797, sec. 118; Shoemaker v. Acker, 116 Cal. 239, 244 (48 Pac. 62). The rule is one of necessity. Damages must be certain of ascertainment. If one engages in a new industry, *there are no probable data of past business* from which the fact can be legally deduced that anticipated profits would have been realized. (Central Coal Co. v. Hartman, 111 Fed. 96, 99 (49 C. C. A. 244).' In Central

Coal Co. v. Hartman, *supra*, we find the following: '*He who is prevented from embarking in a new business can recover no profits*, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced,' citing a number of authorities.

"In 8 Cal. Jur., page 777, the distinction is clearly drawn by the text writer as to when loss of profits may be allowed. *If the business is established and is interrupted, past profits* furnish the basis for calculating the damage. If the business is unestablished, such anticipated profits are held to be remote, uncertain, and speculative, on the ground that no satisfactory statement of the loss can be made. To state it in different language: No one can say that any profits would ever have been realized. The rules which we are here stating relative to loss of future profits are also clearly set forth in Shoemaker v. Acker, 116 Cal., at pp. 244, 245 (48 Pac. 62). The substance of the holding there is that *when the business prevented or interrupted is an established one, a basis for allowing damages is found in the past profits of the concern*, but if no business has ever been done, no profits earned, the possibility of proving profits does not exist, and no court can determine whether there would be profits, or whether the prospective business would not rather result in losses. To the same effect is the case of McConnell v. Water Co., 149 Cal. 65, 66 (8 L. R. A. (N. S.) 1171, 85 Pac. 929). Since the briefs were written in this case, the leading case, California Press Mfg. Co. v. Stafford Pack. Co., above referred to, reported in 192 Cal. 479 (221 Pac. 345), has been re-reported in 32 A. L. R. 114, to which has been appended annotations covering thirty-six pages. On page 126 of the same volume, under the subtitle setting forth the rule of law that no recovery can be had for losses of profits, which are uncertain, speculative, contingent, and conjectural, is collated authorities from nearly every state in the Union, showing an unbroken line of decisions confirming the principle set forth in the case of California Press Mfg. Co. v. Stafford Pack. Co., *supra*,

and on page 153 of the same volume, under the subtitle dealing with the rule relating to anticipated profits of an unestablished busines, is also collected a long list of decisions showing the unanimity of courts in upholding such doctrine. The cases collected and appended in the notes to the principal case, reported in 32 A. L. R. 120, are so extensive and so numerous that it is unnecessary to do more than cite the volume and page of said work to show that plaintiff has no cause of action on account of his alleged loss of anticipated profits, based upon unrealized hopes of an unestablished business. Whatever damage he may have suffered, by reason of the acts of the defendants, must be based upon something tangible and not upon future prospects, and there being nothing of that character in the complaint, and nothing in the complaint other than what we have referred to, it follows that the judgment of the trial court should be affirmed, and it is so ordered."

In *McCormick v. United States Mining Co.*, 185 Fed. 748, (8th Circuit) this principle is announced:

> "The law with respect to loss of profits being the basis of a recovery in an action for damages is that profits which would have been realized, but for the act of defendant, and which are not open to the objection of uncertainty or remoteness, may be recovered, but profits depending upon numerous uncertain and changing contingencies are too indefinite and untrustworthy to constitute a just measure of actual damages. Howard v. Stillwell & Pierce Mfg Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; Coosaw Min. Co. v. Caroline Min. Co., et al., (C. C.) 75 Fed. 860; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96; Cincinnati Gas Co. v. Western Siemens Co., 152 U. S. 200, 14 Sup. Ct. 523, 38 L. Ed. 411; Callaway Min. & Mfg. Co. v. Clark, 32 Mo. 305."

In *Swift & Co. v. Johnson*, 138 Fed. 867, (8th Circuit) the principle is stated thus:

"This court is therefore controlled by the rule of general law applied by the federal courts, which, in respect of the right to and the assessment of purely compensatory damages, excludes all consideration of matters which result in speculation, conjecture, or fancy. Richmond & Danville R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728; Boston & Albany R. Co. v. O'Reilly, 158 U. S. 334, 336, 15 Sup. Ct. 830, 39 L. Ed. 1006; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96; Chicago & N. W. R. Co. v. De Clow, 61 C. C. A. 34, 124 Fed. 142."

In *Homestead Co. v. Des Moines Electric Co.*, 248 Fed. 439, (8th Circuit) the principle is again announced as follows:

"It is true that the general rule is that the expected profits of a commercial business are generally too remote, speculative, and uncertain to sustain a judgment for their loss. But there is an exception to this rule, to the effect that the loss of profits from the destruction, interruption, or depression of an established business may be recovered, if the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. It is true that the proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts, from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn. Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 98, 99, 102, 49 C. C. A. 244, 246, 247, 250."

In *Malone v. Hastings*, 193 Fed. 1, (5th Circuit) the principle is announced in another way, as follows:

"From these authorities we deduce the rule to be that the probable ultimate value of a planted, but unmatured, crop can be used as a basis for assessing damages, when there is evidence of the actual matured value of other crops of a like kind, cultivated

during the same period, in the same vicinity, and under substantially similar conditions."

In *Blankenship v. Lanier*, (Ala.) 101 So. 763, the Supreme Court of Alabama, says:

> "The only exception seems to be that 'the loss of profits from the destruction or interruption of an established business may be recovered for, if the amount of actual loss is rendered reasonably certain by competent proof; but in all such cases it must be made to appear that the business which is claimed to have been interrupted was an established one, and that it had been successfully conducted for such a length of time, and had such a trade established, that the profits thereof are reasonably ascertainable.' 17 Corp. Jur. 795-797 (section 117), and cases cited under note 95. And 'where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied, for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation.' *Id.*, 797 (section 118)."

In *Carolene Sales Co. v. Canyon Milk Products Co.*, (Wash.) 210 Pac. 366, the Supreme Court of Washington, says:

> "In Andreopulos v. Peresteredes, 95 Wash. 282, 163 Pac. 770, the rule of the case of States v. Durkin, 65 Kan. 101, 68 Pac. 1091, is approved where it was held that before special damages for loss of profits to a general business occasioned by the wrongful acts of another may be recovered, it must be made to appear that the business had been in successful operation for such a period of time as to give it permanency and recognition, and that such business was earning a profit which could be reasonably ascertained and approximated."

The above principle is also cited with approval in *Schulz v. Gether,* 198 N. W. 433 (Wis.):

> "Profits depending on numerous, uncertain and changing contingencies are too indefinite and untrustworthy to constitute a just measure of actual damages."

It Was the Legal Duty of the Appellee to Use Due Diligence to Reduce the Amount of the Alleged Damages.

If there was a delay of six days in arriving at the San Clemente waters the appellee could have reduced and mitigated the amount of its alleged damages by remaining there six days longer. There is no evidence in the record that whaling was a seasonable occupation in the San Clemente waters. The only evidence in the record, as to whaling being a seasonable occupation anywhere, is that, at a point 30 miles north of Eureka the whales run until the end of October or the middle of November. [Apost. p. 63.] And that "in Alaska you can only operate in the summer time" [Apost. p. 64.] And that "off San Clemente in Southern California you can operate there the whole winter if you want to, if you find any whales down there." [Apost. p. 64.] Aside from the above, there is no testimony in the record that whaling was a seasonable occupation.

Even if it had been planned that the "Lansing" should arrive in the San Clemente waters on December 13, and even if there were proof that there was a reasonable probability that whales would be caught there at that time, the fact remains that, conceding the "Lansing" did arrive in San Clemente waters six days late, what was

there to prevent her staying and remaining in the San Clemente waters six days longer than she planned to stay or did stay? The only evidence we have of there being any fishing seasons in the San Clemente waters is the aforesaid statement of Mr. Dedrick, and he says that you can operate there the whole winter if you want to, if you find any whales down there. Therefore, if the appellee suffered any loss, even though it was highly speculative, by the reason of the fact that the "Lansing" arrived six days late in the San Clemente waters, the appellee, so far as the records show, had abundant opportunity to recoup its loss by staying there six days longer at the end of the fishing trip. The record contains no showing that the appellee had to leave the San Clemente waters at any particular time and fails to show that the whale fishing season ended at any particular time. Suppose, for an example, that we fit up a launch and plan to put to the open sea a few miles to catch a thousand mackerel. Assume also, which is contrary to the showing here, that we had an established business at the place where we propose to fish for the mackerel and where our probable catch would be ascertainable, with a reasonable degree of certainty. Suppose through some damage to our craft we are delayed six days in getting out to sea. Now what will prevent our staying there and remaining in the waters six days longer, to enable us to catch the thousand fish? In general, there would be but two reasons why we could not remain the six days at the end of our scheduled trip. Either the fishing season would be over, or it were absolutely compulsory for us to get back to land at a particular time, because of the necessity of having something else to do.

Now, in this case the record is silent that there was an end to the whale fishing season. And the record is also silent that there was anything at all that prevented the appellee from staying in the San Clemente waters six days longer than it had planned to remain there. No reasons were given for leaving the San Clemente waters. We must conclude, therefore, from the statement of Mr Dedrick, that the appellee could have operated there the whole winter if it had cared to. There was then no reason why the appellee could not have remained in those waters six days longer and recouped any damages it may have suffered by reason of the alleged six days delay in arriving there.

Under the law it was the duty of appellee to use due diligence to reduce the amount of the alleged damages.

"The Mascot," 282 Fed. 766;

Penn. R. R. Co. v. Washburn et al. (D. C.), 50 Fed. 335;

"The Oregon," 55 Fed. 666, 673, 5 C. C. A. 229;

Wicker v. Hoppock, 73 U S. (6 Wall.) 94, 99, 18 L. Ed. 752;

Warren v. Stoddart, 105 U. S. 224, 229, 26 L. Ed. 1117.

Summary.

We have shown that the prospective profits, for which judgment was entered, were too speculative, conjectural and remote to be the subject of legal damages; that the reasons why the prospective profits were so highly speculative were:

1. That the floating whaling factory was an entirely new arrangement, nothing similar to it having ever been used by the appellee;

2. That this new floating whaling factory had not yet been tried out, and it was, therefore, uncertain as to whether it would work as contemplated;

3. That the appellee was planning to fish for whales in new waters—a place where it had never before fished for whales.

4. That no one else, so far as the record shows, had ever fished for whales in the San Clemente waters, hence there was no available data from which loss of profits could be computed with any reasonable degree of certainty.

5. That as to whether the weather and water conditions in the San Clemente waters were favorable for whale fishing, from December 13th to December 19th, was wholly problematical and uncertain.

6. That even though whales were captured, the size of the whales differed greatly—some producing less than ten barrels of whale oil, others producing as high as sixty barrels of whale oil—and it was, consequently, further impossible to determine the amount of the loss, if there was any loss, with any reasonable degree of certainty.

7. That the only evidence of whales captured in the San Clemente waters was subsequent to the 19th of December, 1926, and hence wholly incompetent and of no probative value to prove that any particular number of whales would have been captured in the San Clemente waters prior to that time.

8. That there was no competent evidence that whaling was a seasonable occupation in the San Clemente waters, hence the appellee could have mitigated its damages by remaining in those waters for a longer period.

In view of the above, therefore, the appellant prays that the final decree of judgment of the United States District Court, for the Northern District of California, Southern Division, made and entered on the 17th day of November, 1930, be reversed.

ROBERT BRENNAN,
H. K. LOCKWOOD,
Proctors for Appellant.

No. 6346

United States

Circuit Court of Appeals

For the Ninth Circuit.

DAVID BURNET, Commissioner of Internal Revenue,

Petitioner,

vs.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY, a Corporation,

Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[1*] DOCKET No. 6988.

SAN JOAQUIN FRUIT & INVESTMENT CO.,
Formerly SAN JOAQUIN FRUIT CO.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES.

For Petitioner: GEO. M. NAUS, Esq.
N. L. McLAREN, C. P. A.
F. O. GRAVES, Esq.
DANA LATHAM, Esq.
J. R. SHERROD, Esq.

For Respondent: JOHN D. FOLEY, Esq.
A. H. PIERCE, Esq.
A. H. MURRAY, Esq.
LLOYD CREASON, Esq.

DOCKET ENTRIES.

1925.

Sept. 10—Petition received and filed.

Sept. 14—Copy of petition served on solicitor.

Sept. 14—Notification of receipt mailed taxpayer.

Oct. 1—Answer filed by solicitor.

Oct. 20—Copy of answer served on taxpayer—Assigned to Field Calendar.

1927.

Feb. 26—Hearing date set 5/3/27—Los Angeles, Calif.

Mar. 30—Application for subpoena filed by taxpayer.

*Page-number appearing at the top of page of original certified Transcript of Record.

Dec. 21—Petition for review by the United States Circuit Court of Appeals (9) with assignments of error filed by General Counsel.

Dec. 26—Proof of service of petition for review filed. (J. Robt. Sherrod.)

1930.

Jan. 8—Proof of service of petition for review filed (respondent). (Dana Latham.)

Jan. 8—Proof of service of petition for review filed (Geo. M. Naus).

Jan. 8—Proof of service of petition for review filed (San Joaquin Fruit & Investment Co.).

Feb. 19—Motion for extension to April 24, 1930, for settlement and transmission of record filed by General Counsel.

Feb. 19—Order enlarging time to April 24, 1930, for preparation of evidence and delivery of record entered.

Apr. 21—Motion for extension to May 24, 1930, to prepare evidence and transmit record filed by General Counsel.

Apr. 22—Order enlarging time to May 24, 1930, for preparation of evidence and delivery of record entered.

May 23—Motion for extension to July 1, 1930, to prepare statement of evidence and transmit record, filed by General Counsel.

May 24—Order enlarging time to July 1, 1930, for preparation of evidence and delivery of record entered.

June 28—Motion for extension to Aug. 1, 1930, to prepare statement and transmit record, filed by General Counsel.

June 30—Order enlarging time to Aug. 1, 1930, for preparation of evidence and delivery of record entered.

July 24—Motion for extension to Oct. 1, 1930, to prepare evidence and transmit record filed by General Counsel.

July 26—Order enlarging time to Oct. 1, 1930, for preparation of evidence and delivery of record entered.

Oct. 1—Motion for extension to 11/15/30, to prepare and transmit record filed by General Counsel.

Oct. 3—Notice of objections to motion for extension filed by taxpayer.

Oct. 1—Order enlarging time to Oct. 7, 1930, for preparation of evidence and delivery of record entered.

Oct. 7—Motion for extension to 11/1/30 to prepare and transmit record filed by General Counsel.

[3] #6988.

1930.

Oct. 7—Order enlarging time to Oct. 14, 1930, for preparation of evidence and delivery of record entered.

Oct. 11—Statement of evidence lodged.

Oct. 13—Praecipe with proof of service thereon filed by General Counsel.

Oct. 13—Notice of lodgment of statement and of hearing on Oct 22, 1930, to approve said statement filed.

Oct. 13—Motion for extension to 11/15/30 to prepare and transmit record filed by General Counsel.

Oct. 14—Order enlarging time to Nov. 15, 1930, for preparation of evidence and delivery of record entered.

Oct. 21—Motion to extend time to Nov. 5, 1930, to submit alternative proposed statement of evidence filed by taxpayer—10/24/30 granted.

Nov. 5—Hearing had before Mr. Murdock on approval of statement of evidence, that page 20 of the statement of evidence be rewritten to include what counsel for respondent stated during course of trial.

Nov. 21—Statement of evidence approved and ordered filed.

Nov. 15—Order enlarging time to Nov. 24, 1930, for preparation of evidence *sur* petition for review and to Jan. 15, 1931, for transmission of the record entered.

Now, Dec. 18, 1930, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[4] DOCKET No. 6989.

SAN JOAQUIN TRUST & INVESTMENT CO.,
Formerly SAN JOAQUIN FRUIT CO.,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

For Petitioner: GEO. M. NAUS, Esq.
N. L. McLAREN, C. P. A.
F. O. GRAVES, Esq.
J. ROBERT SHERROD, Esq.
DANA LATHAM, Esq.

For Respondent: JOHN D. FOLEY, Esq.
A. H. MURRAY, Esq.
A. H. PIERCE, Esq.
LLOYD CREASON, Esq.

DOCKET ENTRIES.

1925.

Sept. 10—Petition received and filed.

Sept. 14—Copy of petition served on Solicitor.

Sept. 14—Notification of receipt mailed taxpayer.

Oct. 1—Answer filed by Solicitor.

Oct. 20—Copy of answer served on Taxpayer—Assigned to Field Calendar.

1927.

Feb. 25—Hearing date set 5/3/27—Los Angeles, Calif.

Mar. 30—Application for subpoena filed by taxpayer.

May 2—Hearing had before Mr. Marquette. Continued to reserve calendar.

May 2—Order continuing proceeding to reserve calendar, signed and filed. Both sides notified.

May 25—Transcript of hearing of 5/3/27 filed.

1928.

Apr. 4—Motion to amend petition filed by taxpayer, amendment tendered.

Apr. 5—Motion granted.

Apr. 10—Order placing proceeding on General Calendar, entered.

Apr. 9—Copy of motion and amended petition served on General Counsel.

June 8—Motion for extension of time to July 8, 1928, to answer filed by General Counsel. Granted.

June 27—Hearing date set 9/19/28.

July 9—Answer to amended petition filed by General Counsel. Copy served 7/18/28.

July 31—Motion to consolidate with docket numbers 6988 and 20,801 for hearing at San Francisco, Calif., filed by taxpayer. See 6988.

Aug. 2—Hearing date set on motion Aug. 15, 1928.

Aug. 3—Copy of motion served on General Counsel.

Aug. 15—Hearing had before Mr. Sternhagen on motion to place on Circuit Calendar;

withdrawn. Continued to Oct. 16, 1928.

[5] #6989.

1928.

Aug. 15—Order consolidating this docket with 6988 and 20,801 and continuing to day calendar of Oct. 16, 1928, entered. See docket 6988.

Sept. 27—Application for subpoena duces tecum filed by taxpayer. See 6988.

Oct. 1—Subpoena duces tecum issued—10/4/28 subpoena served.

Oct. 1—Order on application for subpoena duces tecum entered.

Oct. 16—Hearing had before Mr. Murdock on merits. Submitted. Briefs due 12/15/28.

Nov. 13—Transcript of hearing of Oct. 16, 1928, filed.

Dec. 15—Brief filed by taxpayer. See 6988.

Dec. 17—Motion for extension to Jan. 14, 1929, to file brief, filed by General Counsel. See 6988. Granted 12/18/28.

1929.

Jan. 14—Brief filed by General Counsel.

June 29—Decision entered—B. H. Littleton, Division 4.

June 29—Opinion rendered—John E. Murdock, Division 3. Judgment will be entered for 1918, 1919, 1920; for 1921 dismissed.

Dec. 19—Motion to vacate order of June 29, 1929, and for further order filed by General Counsel, 12/19/29. Denied.

Dec. 21—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by General Counsel. See 6988.

Dec. 26—Proof of service of petition for review filed. (J. Robt. Sherrod.)

1930.

Jan. 8—Proof of service of petition for review filed. (Respondent.) (Danna Latham and Geo. M. Naus.)

Jan. 8—Proof of service of petition for review filed. (San Joaquin Fruit and Investment Co.)

Feb. 19—Motion for extension to April 24, 1930, for settlement and transmission of record filed by General Counsel.

Feb. 19—Order enlarging time to April 24, 1930, for preparation of evidence and delivery of record papers entered.

Apr. 21—Motion for extension to May 24, 1930, to prepare evidence and transmit record filed by General Counsel.

Apr. 22—Order enlarging time to May 24, 1930, for preparation of evidence and delivery of record papers entered.

May 23—Motion for extension to July 1, 1930, to prepare evidence and transmit record filed by General Counsel.

May 24—Order enlarging time to July 1, 1930, for preparation of evidence and delivery of record entered.

June 28—Motion for extension to Aug. 1, 1930, to prepare statement and transmit record filed by General Counsel.

June 30—Order enlarging time to Aug. 1, 1930, for preparation of evidence and delivery of record entered.

July 24—Motion for extension to Oct. 1, 1930, to prepare statement and transmit record, filed by General Counsel.

July 26—Order enlarging time to Oct. 1, 1930, for preparation of evidence and delivery of record entered.

[6] 6989.

1930.

Oct. 1—Motion for extension to 11/15/30 to prepare and transmit record filed by General Counsel.

Oct. 1—Order enlarging time to Oct. 7, 1930, for preparation of evidence and delivery of record entered.

Oct. 3—Notice of objections to motion for extension filed by taxpayer.

Oct. 7—Motion for extension to 11/1/30 to prepare and transmit record, filed by General Counsel.

Oct. 7—Order enlarging time to Oct. 14, 1930, for preparation of evidence and delivery of record entered.

Oct. 11—Statement of evidence lodged.

Oct. 13—Praecipe with proof of service thereon filed.

Oct. 13—Notice of lodgment of statement and of hearing on Oct. 22, 1930, to approve said statement filed.

Oct. 13—Motion for extension to 11/15/30 to prepare and transmit record filed by General Counsel.

Oct. 14—Order enlarging time to Nov. 15, 1930, for preparation of evidence and delivery of record entered.

Oct. 21—Motion for extension to 11/5/30 to submit alternative proposed statement of evidence filed by taxpayer. 10/24/30 granted.

Nov. 5—Hearing had before Mr. Murdock on approval of statement of evidence, that page 20 of the statement of evidence be rewritten to include what petitioner stated during course of trial.

Nov. 21—Statement of evidence approved and ordered filed.

Nov. 15—Order enlarging time to Nov. 24, 1930, for preparation of evidence *sur* petition for review and to Jan. 15, 1931, for transmission of the record enentered.

Now, Dec. 18, 1930, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[7] DOCKET No. 20,801.

SAN JOAQUIN FRUIT & INVESTMENT CO.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES.

For Petitioner: J. R. SHERROD, Esq.
N. L. McLAREN, C. P. A.
GEO. M. NAUS, Esq.
DANA LATHAM, Esq.

For Respondent: JOHN D. FOLEY, Esq.
LLOYD CREASON, Esq.

DOCKET ENTRIES.

1926.

Oct. 25—Petition received and filed. Taxpayer notified.

Oct. 27—Copy of petition served on General Counsel.

Dec. 27—Answer filed by General Counsel.

1927.

Jan. 22—Copy of answer served on taxpayer—Assigned Circuit Calendar.

Feb. 25—Hearing date set 5/3/27, Los Angeles, Calif.

Mar. 30—Application for subpoena filed by taxpayer.

May 2—Hearing had before Mr. Marquette, submitted. Continued to reserve calendar.

May 2—Order continuing proceeding to Reserve Calendar, signed and filed. Both sides notified.

May 25—Transcript of hearing of 5/3/27 filed.

1928.

Apr. 11—Order placing proceeding on General Calendar entered.

June 27—Hearing date set 9/19/28.

July 31—Motion to consolidate with dockets 6988 and 6989 and place on the San Francisco Circuit Calendar filed by taxpayer. See 6988.

Aug. 2—Hearing date set on motion Aug. 15, 1928.

Aug. 3—Copy of motion served on General Counsel.

Aug. 15—Hearing had before Mr. Sternhagen on motion to place on Circuit Calendar; withdrawn. Continued to Oct. 16, 1928.

Aug. 15—Order consolidating this docket with 6988 and 6989 and set for hearing 10/16/28 entered.

Sept. 27—Application for subpoena duces tecum filed taxpayer. See 6988.

Oct. 1—Subpoena duces tecum issued. Subpoena served 10/4/28.

Oct. 1—Order on application for subpoena duces tecum entered.

Oct. 10—Motion for leave to file amended petition, amendment tendered, filed by taxpayer.

Oct. 16—Hearing had before Mr. Murdock on merits. Submitted. Briefs due 12/-15/28.

Nov. 13—Transcript of hearing of 10/16/28 filed.

Dec. 15—Brief filed by taxpayer. See 6988.

Dec. 17—Motion for extension to Jan. 14, 1929, to file brief filed by General Counsel. See 6988. Granted 12/18/28.

1929.

Jan. 14—Brief filed by General Counsel. See 6988.

June 29—Decision entered—B. H. Littleton, Division 4.

[8]

June 29—Opinion rendered—John E. Murdock, Division 3. Judgment will be entered for 1918, 1919, 1920 and for 1921, dismissed.

Dec. 19—Motion for order vacating order of June 29, 1929, and for further order filed by General Counsel. Denied.

Dec. 21—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by General Counsel. See 6988.

Dec. 26—Proof of service filed. (J. R. Sherrod.)

1930.

Jan. 8—Proof of service filed. (Dana Latham.) See 6988.

Jan. 8—Proof of service filed. (Geo. M. Naus.)

Jan. 8—Proof of service filed. (San Joaquin Fruit & Investment Co.)

Feb. 19—Motion for extension to Apr. 24, 1930, for settlement and transmission of record filed by General Counsel. See 6988.

Feb. 19—Order enlarging time to Apr. 24, 1930, for preparation of evidence and delivery of record papers entered.

Apr. 21—Motion for extension to May 24, 1930, to prepare evidence and transmit record filed by General Counsel.

Apr. 22—Order enlarging time to May 24, 1930, for preparation of evidence and delivery of record papers entered.

May 23—Motion for extension to July 1, 1930, to prepare statement of evidence and transmit record filed by General Counsel.

May 24—Order enlarging time to July 1, 1930, for preparation of evidence and delivery of record entered.

June 28—Motion for extension to Aug. 1, 1930, to prepare and transmit record filed by General Counsel.

June 30—Order enlarging time to Aug. 1, 1930, for preparation of evidence and delivery of record entered.

July 24—Motion for extension to Oct. 1, 1930, to prepare evidence and transmit record filed by General Counsel.

July 26—Order enlarging time to Oct. 1, 1930, for preparation of evidence and delivery of record entered.

Oct. 1—Motion for extension to 11/15/30, to prepare and transmit record, filed by General Counsel.

Oct. 3—Notice of objections to respondent's motion for extension of time, filed by taxpayer.

Oct. 1—Order enlarging time to Oct. 7, 1930, for preparation of evidence and delivery of record entered.

Oct. 7—Motion for extension to 11/1/30, to prepare and transmit record filed by General Counsel.

Oct. 7—Order enlarging time to Oct. 14, 1930, for preparation of evidence and delivery of record entered.

Oct. 11—Statement of evidence lodged.

Oct. 13—Praecipe filed by General Counsel. Proof of service thereon.

Oct. 13—Notice of lodgment of statement and of hearing on 10/22/30 to approve said statement filed.

Oct. 13—Motion for extension to 11/15/30 to prepare and transmit record filed by General Counsel.

Oct. 14—Order enlarging time to Nov. 15, 1930, for preparation of evidence and delivery of record entered.

Oct. 21—Motion for extension to 11/5/30 to file alternative proposed statement of evidence filed by taxpayer. 10/24/30 granted.

[9] #20801

1930.

Nov. 5—Hearing had before Mr. Murdock on approval of statement of evidence. Page 20 of the statement of evidence be rewritten to include what counsel for respondent stated during course of trial.

Nov. 21—Statement of evidence approved and ordered filed.

Nov. 15—Order enlarging time to Nov. 24, 1930, for preparation of evidence *sur* petition for review and to Jan. 15, 1931, for transmission of the record entered.

Now, Dec. 18, 1930, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[10] Filed Sept. 10, 1925. U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 6988.

Appeal of SAN JOAQUIN FRUIT AND INVESTMENT CO. (Formerly SAN JOAQUIN FRUIT CO.), Tustin, California.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal

Revenue set forth in his deficiency letter (IT:E: SM–CLB–A–5657–B–3066–60D) dated July 21, 1925, and as the basis of its appeal sets forth the following:

1. The taxpayer is a California corporation with principal office in the city of Tustin, California.

2. The deficiency letter (copy of which is attached, together with copy of Bureau letters dated March 9, 1925 and April 22, 1925, referred to therein), was mailed to the taxpayer on July 21, 1925.

3. The taxes in controversy are income and profits taxes for the calendar years 1918 and 1919 and are more than $10,000.00 to wit: $66,147.93, for the calendar year 1918 and $45,133.14 for the calendar year 1919 together with such additional sums as the Board may find to be legally refundable.

4. The determination of tax contained in the said deficiency letter is based upon the following errors:

(a) That the Commissioner has refused to permit the taxpayer to include in its invested capital for the years 1918 and 1919 the sum of $1,659,372.85 which represents a disallowance of surplus arising from a closed transaction which occurred on November 30, 1916, on which date the taxpayer exercised an option to acquire improved real estate, which option had been acquired on October 13, 1906 and had steadily and continuously increased in value through the ten-year period, and on the date of its exercise had a market value of $1,659,372.85.

[11] (b) That the Commissioner has refused to permit the taxpayer to take a depreciation deduction for the years 1918 and 1919 based on the value of fruit-trees at November 30, 1916, on which date title to the trees was acquired by the taxpayer, by exercise of said valuable option.

(c) That the Commissioner has refused to permit the taxpayer to take a depreciation deduction for the years 1918 and 1919 based on a March 1, 1913, value of fruit-trees included in a leasehold and option owned by the taxpayer on March 1, 1913, which leasehold and option was converted into fee-simple ownership on November 30, 1916.

(d) That although the Commissioner has determined the taxpayer's income and profits tax liability for the years 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 the corporation selected by the Commissioner for this purpose under the provisions of Section 328 did not constitute representative corporations engaged in the same line of business.

5. The facts upon which the taxpayer relies as the basis of its appeal are as follows:

(A) The taxpayer is engaged in the cultivation and sale of citrus fruits and nuts. During the years 1918 and 1919 it owned in fee simple 1,000 acres of real estate of which 600 acres were planted to walnut trees and 400 acres to orange trees. The corporation was organized October 5, 1906, with a paid-in capital of $81,000.00. The entire capital stock was issued in equal parts to C. E. Utt, Sherman Stevens and James Irvine. The stock issued

to James Irvine was shortly afterwards transferred to the Irvine Co. The Irvine Company (referred to hereinafter as the lessor) leased to the taxpayer for a term of ten years, beginning December 1, 1906, and ending November 30, 1916, 1,000 acres of land situated in Orange County, California, upon the following terms:

1. The taxpayer should, at its own expense, set out and plant within four years from the date thereof, all the said land in fruit-trees of various varieties and should properly care for irrigating and cultivating the same and replace all trees that died during the ten-year term of the lease.

2. The taxpayer should also, at its own expense, and during the said term, cultivate crops of grain, beans, peanuts or other products on such portions of land as could be cultivated without material injury to the trees, and prepare such crops for the market at its own expense.

3. A quarter share of said crops including nuts and fruits should be paid to the lessor by the taxpayer as rental.

4. The taxpayer should agree to use every reasonable means to prevent the growth and spread of obnoxious weeds, and under certain conditions if such weeds were not checked, the crop rental was increased to one-half the average total amount produced per acre.

5. The taxpayer should not assign said lease or sublet any portion of the leased premises without the written consent of the lessor.

[12] 6. The taxpayer should, at its own expense, sink wells upon adjacent property owned by the lessor and develop sufficient water for the irrigation of all crops and trees grown upon said land, and construct at its own cost pipe-lines to conduct the water developed thereby to the said leased land, an option to purchase the lands whereon water had been developed by the taxpayer being granted by the lessor.

7. Upon satisfaction of all the conditions of the lease the taxpayer should have the option to purchase any part or all of the leased lands on the last day of the lease at $200.00 per acre, payable ¼ cash on the exercise of the option and the balance in two equal payments within five years after date of purchase, the deferred payments to bear interest at 6% per annum.

8. In the event that the taxpayer should not exercise its option to purchase said leased lands, then upon the expiration of the term of the lease, the lessor should have the option of purchasing from the taxpayer its entire water system and the water developed, upon the payment of the actual cost thereof, less depreciation.

9. The lease also provided that at any time after the entire 1,000 acres were set out to trees, and before the expiration of the lease, the taxpayer might purchase not to exceed ½ of the said leased lands upon the payment to the lessor of $200.00 per acre cash; but if such option were exercised then the option to purchase the balance of the land at the expiration of the lease was terminated.

10. After the expiration of the term of the lease, said option should cease and terminate as to the portion of said lands not purchased thereunder.

11. During the terms of the lease all taxes upon the real estate were payable by the lessor and all taxes upon the improvements were payable by the taxpayer.

In accordance with the terms of the above contract the taxpayer corporation took possession of the leased property on or about November 1, 1906. The land at this time was dry and unirrigated. A portion of it had been previously grown to crops of grain and beans but the remainder was still covered with cactus. Within six months' time the taxpayer cleared the land, filled in gulches, leveled the property for irrigation and set out 740 acres to trees. Before the end of the first year the irrigating system was so far advanced that water was being delivered to the highest portion of the land. Before the end of the third year the remaining 260 acres of land were planted to orchard trees.

[13] During the ten-year period covered by the lease the entire time of two of the stockholders, Messrs. Utt and Stevens, was devoted to the affairs of the corporation, for which they received no compensation except nominal salaries of $100.00 per month each in the nature of drawing accounts for living expenses.

Before the expiration of the lease the property had been highly improved, including the installation of a complete underground irrigation system, electric lights and electric power, modern houses

and rooms, dining-room for employees, maintenance of a large automobile bus for the benefit of school children, postoffice for employees and the employment of a gardener to maintain the appearance of the property immediately adjacent to the ranch headquarters.

On November 30, 1916, the taxpayer's option to purchase the property was exercised and the first payment of $75,000.00 provided by the contract was made. The second and final payments of $50,000.00 and $75,000.00 were made on December 31, 1917, and October 28, 1919, respectively.

On November 30, 1916, the value of the real estate and trees thus acquired by the corporation was $1,854,000.00 as determined by independent appraisal.

In its original returns for the years 1918 and 1919 the taxpayer claimed as a part of its invested capital a paid-in surplus of $1,554,530.07 which represents the difference between the sum of $200,000.00 paid in cash as a portion of the purchase price of the property on November 30, 1916, and the value placed by the corporation on the real estate and trees on that date. Under date of January 25, 1922, the taxpayer revised its claim on the basis of independent appraisals and sought to obtain paid-in surplus in the sum of $1,659,372.85. The report of an Internal Revenue Agent dated November 14, 1921, disallowed the claim for paid-in surplus and the action of the examining agent in this respect was upheld by the Income Tax Unit. The application of the taxpayer for a hearing before the Solicitor of Internal Revenue

was denied by the Income Tax Unit and the final computations set forth in the Internal Revenue Bureau's letter of July 21, 1925, make no allowance for any portion of the paid-in surplus claimed by the taxpayer.

Upon the exercise of said option, and ever since, this taxpayer corporation has had, and is entitled to include in its invested capital, earned surplus and undivided profits amounting to not less than $1,659,372.85 arising from the conversion of capital assets.

(B) In its original return for the year 1918 the taxpayer deducted $23,158.54 covering depreciation of its fixed assets. This deduction was arrived at on an arbitrary basis and did not give effect to depreciation sustained during the year on the orchard trees based on their value at date of their acquisition by the corporation. Said value as determined by independent appraisal was $1,100.00 per acre and the life of the trees was approximately 25 years from November 30, 1916. In its original return for the year 1919 the taxpayer deducted depreciation of $48,790.14 covering depreciation of its physical properties including trees. The deductions for the years 1918 and 1919 were increased to $43,378.80 and $52,226.71 respectively, by the Revenue Agent, but the Commissioner eliminated the major portion of the depreciation [14] deduction applicable to the taxpayer's orchard trees for both years, and did not give effect to the value of these assets at date of acquisition in establishing the deduction for depreciation.

(C) The value of the orchard trees leased to the taxpayer on March 1, 1913 and to which title was acquired by the taxpayer on November 30, 1916, was $1,115.00 per acre. In the report of the Internal Revenue Agent dated November 14, 1921, referred to hereinabove, depreciation on orchard trees at the rate of 3% was allowed upon a value of $1,115.00 per acre, which the agent upon investigation found to be conservative based on a life of 33⅓ years. In computing the depreciation deduction based on the 1913 value the agent erred in using the rate of 3% for the reason that of the estimated life of the trees approximately five years had elapsed prior to March 1, 1913. Consequently the annual rate of depreciation based on the 1913 value should be increased to 3½%. However, the Income Tax Unit refused to consider the value at March 1, 1913 in establishing tree depreciation for the reason that title to the property was not acquired by the taxpayer until November 30, 1916. As indicated hereinabove, the taxpayer owned a property right on March 1, 1913, which was exchanged for a greater property right on November 30, 1916; but the Commissioner has not given effect either to the value of property rights at March 1, 1913, or November 30, 1916, in establishing the depreciation deduction.

(D) The taxpayer's application for assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918 was favorably entertained by the Commissioner, who determined that abnormalities of invested capital were present for the

years 1918 and 1919 entitling the taxpayer to assessment under these sections. A careful and diligent inquiry discloses the fact that the representative companies whose circumstances were similar to the taxpayer during the years in question failed to pay the rate of excess profits tax stated by the Commissioner to constitute the fair comparative rate.

6. The taxpayer in support of its appeal relies upon the following propositions of law:

(A) 1. Where a corporation exercises a valuable long term option to acquire property under lease to said corporation (which option has greatly and steadily increased in market value throughout the term thereof), the consideration being cash, together with the performance of covenants contained in the lease and option contract, and where such covenants require intensive development of such leased property, its complete operation and the assumption of business hazards during the life of the lease and option, the difference between the cash consideration and the value of the assets acquired represents a portion of the corporation's invested capital under the purview of Section 326 (a) (3) of the Revenue Act of 1918, particularly if and when that difference is equivalent to the market value of the option exercised.

2. Where a corporation exchanges cash and assets other than cash, which other assets have a definite market value, for property having a different form and identity in a *bona fide* transaction with a third person, then the aggregate of the cash and the market value of assets other than cash is

the capital invested by the corporation in the property received in exchange.

[15] (B) 1. Where a corporation exercises a valuable long term option to acquire property under lease to said corporation (which option has greatly and steadily increased in market value throughout the term thereof), the consideration being cash, together with the performance of covenants contained in the lease contract, and where such covenants consist of the intensive development of such leased property, its complete operation and the assumption of business hazards during the life of the lease, depreciation upon property subject to exhaustion acquired as the result of such a transaction is properly based upon its fair value at the date of acquisition under the purview of Section 234 (a) (7) of the Revenue Act of 1918.

2. Where a corporation acquires property in exchange for other property and the property received in the exchange is such as will physically deteriorate, the corporation is entitled to an allowance for depreciation based on the value of property that it gave in the exchange.

(C) A leasehold is susceptible of depreciation under the purview of Section 234 (a) (7) of the Revenue Act of 1918, and if such leasehold is exchanged for absolute ownership of the same property, the taxpayer is not thereby deprived of depreciation based on the March 1, 1913, value of the property.

(D) Where the Commissioner has determined that abnormalities of invested capital or net in-

come exist under the purview of Section 327 (d) of the Revenue Act of 1918 the Commissioner must compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined and which are as nearly as may be similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, in order to comply with the provisions of Section 328 (a) of the Revenue Act of 1918.

WHEREFORE, the taxpayer respectfully prays that this board may hear and determine its appeal.

Respectfully submitted,
N. L. McLAREN,
GEORGE M. NAUS,
Counsel for the Taxpayer.

State of California,
County of Orange,—ss.

C. E. Utt, being duly sworn, says that he is the President of the San Joaquin Fruit and Investment Company, a successor to the San Joaquin Fruit Company, the taxpayer named in the foregoing petition and as such President is duly authorized to verify the foregoing petition; that he has read the said petition or had the same read to him and is familiar with the statements therein contained and that the facts therein stated are true, except such facts as are stated to be upon information and belief and those facts he believes to be true.

C. E. UTT,
President.

Subscribed and sworn to before me this 2d day of September, 1925.

[Seal] W. S. LEMBERGER,
Notary Public.

My commission expires Aug. 16, 1928.

[16] TREASURY DEPARTMENT,
Washington.
July 21, 1925.

IT:E:SM.
CLB.–A.–5657.
B.–3066–60D.

San Joaquin Fruit & Investment Company,
Tustin, California.

Sirs: The determination of your income tax liability for the years 1918 and 1919 has resulted in a deficiency in tax aggregating $111,281.07, as set forth in Bureau letters dated March 9, 1925 and April 22, 1925.

(Here follows regular 60-day letter.)

Respectfully,
D. H. BLAIR,
Commissioner.
By (Signed) C. B. ALLEN,
Acting Deputy Commissioner.

Inclosures:
Statements.
Agreement—Form A.

[17] STATEMENT.

IT:E:SM.
CLB.–A.–5657.
B.–3066–60D.

In re: San Joaquin Fruit & Investment Co., Tustin, California.

Year.	Deficiency.
1918	$66,147.93
1919	45,133.14
Total,	$111,281.07

After a careful review of your protests dated April 8, 1925, and May 6, 1925, and of all the evidence submitted in support of your contentions, you are advised that the Bureau holds that an allowance for depreciation cannot be computed on the fair market value as at March 1, 1913, of property which was purchased and acquired in 1916. Accordingly, the conclusions set forth in Bureau letters dated March 9, 1925, and April 22, 1925, are sustained.

[18] TREASURY DEPARTMENT.
Washington.

March 9, 1925.

IT:E:SM.
CLB.–A.–5657.

San Joaquin Fruit & Investment Co.,
Tustin, California.

Sirs: An audit of your income and excess profits tax returns for the calendar year 1918 has resulted

in the determination of a deficiency in tax of $66,147.93 as shown in the attached statement.

(Here follows regular 30-day letter.)

Respectfully,

(Signed) J. G. BRIGHT,
Deputy Commissioner.

[19] STATEMENT.

Deficiency in Tax—$66,147.93.

A redetermination of your income and profits tax liability for the year 1918 under the provisions of Section 327 as prescribed by Section 328 of the Revenue Act of 1918 based upon the additional information and facts presented at the oral conference held with your representatives, results in the following computation:

COMPUTATION OF TAX.

Income agreed to by taxpayer		$175,992.33	
Less: Profits Tax Section 328	$78,746.41		$78,746.41
Exemption	2,000.00	80,746.41	
Taxable at 12%		$95,245.92	11,429.51
Total tax assessable			$90,175.92
Tax assessed: Original return Account #401285			24,027.99
Deficiency in tax			$66,147.93

[20] TREASURY DEPARTMENT.
Washington.

April 22, 1925.

IT:E:SM.
CLB.–B.–3066.
San Joaquin Fruit & Investment Co.,
Tustin, California.

Sirs: An audit of your income and excess profits tax returns for the calendar year 1919 has resulted in the determination of a deficiency in tax of $45,133.14 as shown in the attached statement.

(Here follows regular 30-day letter.)

Respectfully,
(Signed) J. G. BRIGHT,
Deputy Commissioner.

[21] STATEMENT.

IT:E:SM.
CLB-B-3066.

In re: San Joaquin Fruit Co.
Tustin, California.
Deficiency in Tax—$45,133.14.
Year 1919.

You are advised that after careful consideration and review, your application under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of the Revenue Act of 1918 has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

Net income as shown in office letter dated November 2, 1922		$235,166.20	
Less:			
Interest on obligations of the United States	$ 810.81		
Profits tax (Section 328)	$56,369.95		$56,369.95
Exemption	2,000.00	59,180.76	
Balance taxable at 10%		$175,985.44	17,598.54
Tax assessable			$73,968.49
Original tax #401,447	$28,883.80		
Less: Amount abated January 19, 1921	48.45		28,835.35
Deficiency in Tax			$45,133.14

In accordance with a request on file in this office, a copy of this letter is being forwarded to your representatives, S. D. Leidesdorf & Co., Southern Bldg., Washington, D. C.

Now, Dec. 18, 1930, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[22] Filed Oct. 1, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.
DOCKET No. 6988.

Appeal of SAN JOAQUIN FRUIT & INVESTMENT CO., Tustin, Calif.

ANSWER.

Comes now the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(1) Admits the statements contained in paragraphs 1, 2 and 3 of the petition.

(2) Admits that the taxpayer is engaged in the cultivation of citrus fruits and nuts.

(3) Admits that the taxpayer was organized as a corporation on or about October 5, 1906, with a paid-in capital stock of $81,000.00.

(4) Admits that the taxpayer leased from the Irvine Company, 1,000 acres of land for a term of

10 years beginning on or about December 1, 1906, and ending on or about November 30, 1916.

(5) Admits that the taxpayer had an option to purchase the said 1,000 acres of land at a price of $200.00 per acre.

(6) Admits that the taxpayer operated under this lease as claimed in the taxpayer's petition.

(7) Admits that on November 30, 1916, the taxpayer exercised its option under its agreement and purchased the said 1,000 acres of land, together with the improvements thereon, for the agreed sum of [23] $200,000.00 and that that consideration was paid and payable as specified in the taxpayers' petition.

(8) Admits that the Commissioner in the computation of the taxpayer's invested capital for the taxable years involved, allowed only $200,000.00 representing the cost of the land, together with the improvements thereon.

(9) Admits that the Commissioner in determining the taxpayer's depreciation predicated the amount of depreciation allowable upon the basis of the cost of the land and improvements thereon of $200,000.00.

(10) Denies that the cost to the taxpayer of the 1,000 acres of land, together with improvements thereon, was in excess of $200,000.00.

(11) Denies that on the date the taxpayer exercised its option to purchase the 1,000 acres of land, together with improvements thereon for a purchase price of $200,000.00, that the appraised value of the land, together with improvements thereon, was

$1,854,000.00, or, that if it were, it is material or relevant to the issue in controversy.

(12) Denies that the cost of the depreciable assets as determined by the Commissioner is not the true cost thereof.

(13) Denies that the appraised value of the depreciable assets on the 1,000 acres of land was $1,100.00 per acre, or, that if it were, it is material or relevant to the issue in controversy.

(14) Denies that the March 1, 1913, value of the orchard trees on the land was $1,115.00 per acre, or, that if it were, it is material or relevant to the issue in controversy.

(15) Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

[24] PROPOSITIONS OF LAW.

(1) Only the cost of asset purchased by a taxpayer may be included in the taxpayer's assets in the determination of the taxpayer's invested capital under the provisions of Sections 325–326 of the Revenue Act of 1918.

(2) Appreciation of an asset purchased under an option agreement, which appreciation occurs from the date the option is taken to the date of the exercise thereof, does not constitute either paid-in surplus or earned surplus.

(3) Depreciation may be predicated only upon the cost of property acquired subsequent to March 1, 1913.

(4) The Commissioner has allowed a reasonable amount of depreciation as a deduction.

(5) The taxpayer is not entitled to any other or further relief in the determination of its profits taxes for the years 1918 and 1919 than has been allowed by the Commissioner.

WHEREFORE, it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. GREGG,
Solicitor of Internal Revenue.
Attorney for Commissioner of Internal Revenue.

Of Counsel:

WARD LOVELESS,
Special Attorney,
Bureau of Internal Revenue.

WL/mvb.

Now, Dec. 18, 1930, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE.
Clerk, U. S. Board of Tax Appeals.

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[25] Filed Apr. 4, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 6988.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION FOR LEAVE TO AMEND.

Comes now the above-named petitioner, by its attorneys, and moves the Board that it be granted permission to amend and file its petition in accordance with the completed amended petitions attached hereto.

(Signed) DANA LATHAM.
DANA LATHAM,
Title Insurance Bldg.,
Los Angeles, Calif.
(Signed) F. O. GRAVES.
F. O. GRAVES,
c/o Miller & Chevalier,
Southern Bldg.,
Washington, D. C.
Of Counsel.

Motion dated April 2, 1928.
Granted Apr. 5, 1928.
(Signed) B. H. LITTLETON,
Member, U. S. Board of Tax Appeals.

Now, Dec. 18, 1930, the foregoing motion to amend and order granting same certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[26] United States Board of Tax Appeals.

DOCKET No. 6988.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY, Tustin, California,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDED AND SUPPLEMENTAL PETITION.

The above-named petitioner hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:E: SM–CLB–A–5657–B–3068–60D), dated July 21, 1925, and as the basis of its appeal sets forth the following:

1. The petitioner is a California corporation which was organized on or about July 24, 1922, and which was not in existence during the taxable years 1918 or 1919 or any portion or portions thereof.

2. The deficiency letter (copy of which is attached and marked Exhibit "A") was mailed to the petitioner on July 21, 1925.

3. The taxes in controversy are not taxes of your petitioner but appear to be income and profits taxes for the calendar years 1918 and 1919, assessable, if at all, against the San Joaquin Fruit Company, a corporation other than the corporation to whom the aforesaid deficiency letter was addressed, and are

more than $10,000.00, to wit: $66,147.93 for the calendar year 1918 and $45,133.14 for the calendar year 1919.

[27] 4. The determination of tax contained in the said deficiency letter is based upon the following errors:

(a) That the petitioner was not in existence during the years in question and hence could not be liable as a taxpayer for any alleged deficiency;

(b) That the San Joaquin Fruit Company was dissolved as a corporation during the year 1922 and its existence was then and there terminated;

(c) That the deficiency letter in question was received by the petitioner during the year 1925, prior to the passage of the Revenue Act of 1926, and that under the provisions of the Revenue Act of 1924 there can be no liability upon the petitioner as a transferee of assets for taxes alleged to be due from a transferor, even though it should be assumed that Section 280 of the Revenue Act of 1926 is constitutional and is applicable to the facts herein involved;

(d) That the Commissioner is attempting to exercise judicial power in violation of Section 1 of Article 3 of the Constitution of the United States;

(e) That said Section 280 is without retroactive application to a transfer completed before the effective date of said Section 280.

(f) That upon information and belief petitioner alleges there is no tax liability due from the San Joaquin Fruit Company for the years 1918 or 1919 for the following reasons:

(1) That the Commissioner failed and refused to permit the San Joaquin Fruit Company to include in its invested capital for the calendar years 1918 and 1919 the sum of $1,659,372.85, which represents the disallowance of surplus arising from a closed transaction which occurred on [28] November 30, 1916 on which date the San Joaquin Fruit Company exercised an option to acquire certain improved real estate, which option had been acquired on October 13, 1906 and had steadily and continuously increased in value through the ten-year period and on the date of its exercise had a market value of $1,659,372.85.

(2) That the Commissioner has failed and refused to permit the San Joaquin Fruit Company to deduct depreciation for the years 1918 and 1919 based on the value of fruit-trees at November 30, 1916, on which date title to the trees was acquired by the San Joaquin Fruit Company by exercise of said option.

(3) That the Commissioner has failed and refused to permit the San Joaquin Fruit Company to deduct depreciation for the years 1918 and 1919 based on a March 1, 1913, value of fruit-trees included in a leasehold and option owned by the San Joaquin Fruit Company on March 1, 1913, and which leasehold and options were converted into fee-simple ownership on November 30, 1916.

(4) That although the Commissioner has determined the San Joaquin Fruit Company's income and profits tax liability for the years 1918 and 1919 under the provisions of Sections 327 and 328 of the

Revenue Act of 1918 the corporations selected by the Commissioner for this purpose under the provisions of Section 328 did not constitute representative corporations engaged in the same line of business.

(g) That upon information and belief petitioner alleges that the statute of limitations has run against the collection of any deficiency in tax for the years in question from the San Joaquin Fruit Company, in that no assessment was made nor any deficiency letter mailed to it within five years after returns were filed by it for the tax years 1918 and 1919.

[29] (h) That the statute of limitations has run against the collection of any deficiency in tax for the years in question from the petitioner under the provisions of Section 280 of the Revenue Act of 1926, or any other applicable provision of law, in that no assessment of liability as a transferee of property of the taxpayer, San Joaquin Fruit Company, a corporation, or otherwise or at all, was made or levied within one year after the expiration of the period of limitation for assessment against the said San Joaquin Fruit Company.

(i) That the Commissioner of Internal Revenue was, and is, without jurisdiction of the subject matter of an alleged liability of petitioner, either as an alleged taxpayer or as an alleged transferee of assets, in the premises.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The San Joaquin Fruit Company was organized on or about October 5, 1906. During the

period from December 1, 1906, until its dissolution on December 26, 1922, it was engaged in the orchard business. The San Joaquin Fruit and Investment Company, which was incorporated on or about July 24, 1922, acquired the operating properties of the San Joaquin Fruit Company in exchange for stock on or about November 6, 1922, but assumed no liabilities of the San Joaquin Fruit Company at this or any other date.

(b) The San Joaquin Fruit Company made Federal income and profits tax returns for the calendar years 1918 and 1919 on, to wit: June 15, 1919, and March 15, 1920, respectively. Thereafter the Commissioner of Internal Revenue caused the books of the San Joaquin Fruit Company to be examined by an Internal Revenue Agent and as the result of this examination asserted an additional tax liability on the part of the said San Joaquin Fruit Company for the [30] years in question. Thereafter, a series of conferences was held in Washington, D. C., in the offices of the Internal Revenue Bureau followed by the issuance by the Commissioner of a so-called deficiency letter for the years 1918 and 1919 dated July 21, 1925. Said deficiency letters were addressed to San Joaquin Fruit and Investment Company. Within the period prescribed by law within which to file an appeal, the San Joaquin Fruit and Investment Company filed a petition with the United States Board of Tax Appeals covering the years 1918 and 1919, in which is set forth certain facts relating to the San Joaquin Fruit Company.

(c) The San Joaquin Fruit Company was engaged in the cultivation and sale of citrus fruits and nuts. During the years 1918 and 1919 it owned in fee simple 1,000 acres of real estate of which 600 acres were planted to walnut trees and 400 acres to orange trees. The corporation was organized October 5, 1906 with a paid-in capital of $81,000.00. The entire capital stock was issued in equal parts to C. E. Utt, Sherman Stevens and James Irvine. The stock issued to James Irvine was shortly afterwards transferred to the Irvine Company. The Irvine Company (referred to hereinafter as the lessor) leased to the San Joaquin Fruit Company for a term of ten years, beginning December 1, 1906, and ending November 30, 1916, 1,000 acres of land situated in Orange County, California, upon the following terms:

1. The San Joaquin Fruit Company should, at its own expense, set out and plant within four years from the date thereof, all the said land in fruit-trees of various varieties and should properly care for irrigating and cultivating the same and replace all trees that died during the ten-year term of the lease.

2. The San Joaquin Fruit Co. should also, at its own expense, and during the said term, cultivate crops of grain, beans, peanuts or other [31] products on such portions of land as could be cultivated without material injury to the trees, and prepare such crops for the market at its own expense.

3. A quarter share of said crops including nuts and fruits should be paid to the lessor by the San Joaquin Fruit Company as rental.

4. The San Joaquin Fruit Company should agree to use every reasonable means to prevent the growth and spread of obnoxious weeds, and under certain conditions if such weeds were not checked, the crop rental was increased to one-half the average total amount produced per acre.

5. The San Joaquin Fruit Company should not assign said lease or sublet any portion of the leased premises without the written consent of the lessor.

6. The San Joaquin Fruit Company should, at its own expense, sink wells upon adjacent property owned by the lessor and develop sufficient water for the irrigation of all crops and trees grown upon said land, and construct at its own cost pipelines to conduct the water developed thereby to the said leased land, an option to purchase the lands whereon water had been developed by the San Joaquin Fruit Company being granted by the lessor.

7. Upon satisfaction of all the conditions of the lease the San Joaquin Fruit Company should have the option to purchase any part or all of the leased lands on the last day of the lease at $200.00 per acre, payable ¼ cash on the exercise of the option and the balance in two equal payments within five years after date of purchase, the deferred payments to bear interest at 6% per annum.

[32] 8. In the event that the San Joaquin

Fruit Company should not exercise its option to purchase said leased lands, then upon the expiration of the term of the lease, the lessor should have the option of purchasing from the San Joaquin Fruit Company its entire water system and the water developed, upon the payment of the actual cost thereof, less depreciation.

9. The lease also provided that at any time after the entire 1,000 acres were set out to trees, and before the expiration of the lease the San Joaquin Fruit Company might purchase not to exceed ½ of the said leased lands upon the payment to the lessor of $200.00 per acre cash; but if such option were exercised then the option to purchase the balance of the land at the expiration of the lease was terminated.

10. After the expiration of the term of the lease, said option should cease and terminate as to the portion of said lands not purchased thereunder.

11. During the terms of the lease all taxes upon the real estate were payable by the lessor and all taxes upon the improvements were payable by the San Joaquin Fruit Company.

In accordance with the terms of the above contract the San Joaquin Fruit Company took possession of the leased property on or about November 1, 1906. The land at this time was dry and unirrigated. A portion of it had been previously grown to crops of grain and beans but the remainder was still covered with cactus. Within six months' time the San Joaquin Fruit Company

cleared the land, filled in gulches, leveled the property for irrigation and set out 740 acres to trees. Before the end of the first year the irrigating system was so far advanced that water was being delivered to the highest portion of the land. Before the end of the third year the remaining 260 acres of land [33] were planted to orchard trees.

During the ten-year period covered by the lease the entire time of two of the stockholders, Messrs. Utt and Stevens, was devoted to the affairs of the corporation, for which they received no compensation except nominal salaries of $100.00 per month each in the nature of drawing accounts for living expenses.

Before the expiration of the lease the property had been highly improved, including the installation of a complete underground irrigation system, electric lights and electric power, modern houses and rooms, dining-room for employees, maintenance of a large automobile bus for the benefit of school children, postoffice for employees and the employment of a gardener to maintain the appearance of the property immediately adjacent to the ranch headquarters.

On November 30, 1916, the San Joaquin Fruit Company's option to purchase the property was exercised and the first payment of $75,000.00 provided by the contract was made. The second and final payments of $50,000.00 and $75,000.00 were made on December 31, 1917, and October 28, 1918, respectively.

On November 30, 1918, the value of the real estate and trees thus acquired by the corporation was $1,854,000.00 as determined by independent appraisal.

In its original returns for the years 1918 and 1919 the San Joaquin Fruit Company claimed as a part of its invested capital a paid-in surplus of $1,554,-530.07 which represents the difference between the sum of $200,000.00 paid in cash as a portion of the purchase price of the property on November 30, 1916, and the value placed by the corporation on the real estate and trees on that date. Under date of January 25, 1922, the Company revised its claim on the basis of independent appraisals and sought to obtain paid-in surplus in [34] the sum of $1,659,372.85. The report of an Internal Revenue Agent dated November 14, 1921, disallowed the claim for paid-in surplus and the action of the examining agent in this respect was upheld by the Income Tax Unit. The application of the San Joaquin Fruit Company for a hearing before the Solicitor of Internal Revenue was denied by the Income Tax Unit and the final computations set forth in the Internal Revenue Bureau's letter of July 21, 1925, make no allowance for any portion of the paid in surplus claimed by the San Joaquin Fruit Company.

Upon the exercise of said option, and ever since San Joaquin Fruit Company has had, and is entitled to include in its invested capital, earned surplus and undivided profits amounting to not less

than $1,659,372.85 arising from the conversion of capital assets.

(d) In its original return for the year 1918 San Joaquin Fruit Company deducted the $23,158.54 covering depreciation of its fixed assets. This deduction was arrived at on an arbitrary basis and did not give effect to depreciation sustained during the year on the orchard trees based on their value at date of their acquisition by the corporation. Said value as determined by independent appraisal was $1,100.00 per acre and the life of the trees was approximately 25 years from November 30, 1916. In its original return for the year 1919 the San Joaquin Fruit Company deducted depreciation of $48,790.14 covering depreciation of its physical properties including trees. The deductions for the years 1918 and 1919 were increased to $43,378.80 and $52,226.71 respectively, by the Revenue Agent, but the Commissioner eliminated the major portion of the depreciation deductions applicable to the San Joaquin Fruit Company's orchard trees for both years, and did not give effect to the value of these assets at date of acquisition in establishing the deduction for depreciation.

[35] (e) The value of the orchard trees leased to the San Joaquin Fruit Company on March 1, 1913, and to which title was acquired by it on November 30, 1916, was $1,115.00 per acre. In the report of the Internal Revenue Agent dated November 14, 1921, referred to hereinabove, depreciation on orchard trees at the rate of 3% was allowed upon a value of $1,115.00 per acre, which the agent

upon investigation found to be conservative based on a life of 33⅓ years. In computing the depreciation deduction based on the 1913 value the agent erred in using the rate of 3% for the reason that of the estimated life of the trees approximately five years had elapsed prior to March 1, 1913. Consequently the annual rate of depreciation based on the 1913 value should be increased to 3½%. However, the Income Tax Unit refused to consider the value at March 1, 1913, in establishing tree depreciation for the reason that title to the property was not acquired by the San Joaquin Fruit Company until November 30, 1918. As indicated hereinabove, the San Joaquin Fruit Company owned a property right on March 1, 1913, which was exchanged for a greater property right on November 30, 1916; but the Commissioner has not given effect either to the value of property rights at March 1, 1913, or November 30, 1916, in establishing the depreciation deduction.

(f) The San Joaquin Fruit Company's application for assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918 was favorably entertained by the Commissioner, who determined that abnormalities of invested capital were present for the years 1918 and 1919 entitling the San Joaquin Fruit Company to assessment under these sections. A careful and diligent inquiry discloses the fact that the representative companies whose circumstances were similar to the San Joaquin Fruit Company during the years in question failed to pay

the rate of excess profits tax stated by the Commissioner to constitute the fair comparative rate.

[36] All facts stated hereinabove which relate to the San Joaquin Fruit Company are, for the purposes of this petition, stated to be upon information and belief, because the San Joaquin Fruit Company, a dissolved corporation was the real taxpayer and not the petitioner.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and hold as follows:

(a) That no deficiency in tax on the part of the San Joaquin Fruit and Investment Company as a taxpayer exists for the years in question.

(b) That no deficiency in tax, nor any liability, on the part of the San Joaquin Fruit and Investment Company as a transferee exists for the years in question.

(c) That the Commissioner of Internal Revenue is without jurisdiction as hereinabove alleged.

(d) That assessment of the taxes in controversy against San Joaquin Fruit Company, a corporation, is barred by limitation of time, under Section 277 of the Revenue Act of 1926.

(e) That assessment of any alleged liability against petitioner as a transferee of property of said taxpayer is barred by limitation of time under Section 280 of the Revenue Act of 1926.

(f) That no tax liability is due from the San Joaquin Fruit Company for the following reasons:

(1) That San Joaquin Fruit Company is entitled to paid-in surplus in the sum of $1,659,572.85 for the calendar years 1918 and 1919.

(2) That the San Joaquin Fruit Company is entitled to depreciation for the years 1918 and 1919 based on the November 30, 1916, value of its orchard trees.

[37] (3) That the San Joaquin Fruit Company is entitled to depreciation for the years 1918 and 1919 based on the March 1, 1915, value of its leasehold and option.

(4) That the San Joaquin Fruit Company is entitled to additional relief for the years 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

(g) That judgment of this Board be entered herein in favor of petitioner.

(Signed) N. L. McLAREN, C. P. A.
N. L. McLAREN, C. P. A.,
444 California Street,
San Francisco California,
(Signed) GEORGE M. NAUS.
GEORGE M. NAUS, Atty.-at-Law,
582 Market Street,
San Francisco California,
(Signed) DANA LATHAM.
DANA LATHAM, Atty.-at-Law.,
Title Insurance Building,
Los Angeles, California,
Counsel for Petitioner.

State of California,
County of Orange,—ss.

C. E. Utt, being duly sworn, says that he is the President of the [38] San Joaquin Fruit & In-

vestment Company, successor to the San Joaquin Fruit Company, the petitioner above named, and as such President is duly authorized to verify the foregoing petition. That he has read the foregoing petition or had the same read to him and is familiar with the statements contained therein and that the facts stated are true, except as to those facts stated to be upon information and belief and those facts he believes to be true.

C. E. UTT.

Subscribed and sworn to before me this 23d day of March, 1928.

[Seal] W. S. LEINBERGER,
Notary Public.

My commission expires Aug. 16, 1928.

[39] TREASURY DEPARTMENT,
Washington.

July 21, 1925.

IT:E:SM.
CLB.–A–5657.
B.–3066–60D.
San Joaquin Fruit & Investment Company,
Tustin, California.

Sirs: The determination of your income tax liability for the years 1918 and 1919 has resulted in a deficiency in tax aggregating $111,281.07, as set forth in Bureau letters dated March 9, 1925, and April 22, 1925.

(Here follows regular 60-day letter.)

Respectfully,

D. H. BLAIR,
Commissioner.
By C. B. ALLEN,
Acting Deputy Commissioner.

Enclosures:
Statements
Agreement—Form A.

[40] STATEMENT.

IT:E:SM.
CLB.–A–5657.
B.–3066–60D.
In re: SAN JOAQUIN FRUIT & INVESTMENT CO.,
Tustin, California.

Year.	Deficiency.
1918	$ 66,147.93
1919	45,133.14
Total	$111,281.07

After a careful review of your protests dated April 8, 1925, and May 6, 1925, and of all the evidence submitted in support of your contentions, you are advised that the Bureau holds that an allowance for depreciation cannot be computed on the fair market value as at March 1, 1913, of property which was purchased and acquired in 1916. Accordingly, the conclusions set forth in Bureau let-

ters dated March 9, 1925, and April 22, 1925, are sustained.

Now, Dec. 18, 1930, the foregoing amended petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[41] Filed Jul. 9, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 6988.

SAN JOAQUIN FRUIT & INVESTMENT CO.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER TO AMENDED PETITION.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the amended petition of the above-named taxpayer admits and denies as follows:

1. Denies the allegations in paragraph 1.
2. Admits the allegations in paragraph 2.
3. Answering the allegations in paragraph 3, he admits that the taxes in controversy are for the calendar years 1918 and 1919. Denies the remaining allegations in paragraph 3.

5, (a) Answering the allegations in paragraph 5, (a), he admits that the San Joaquin Fruit Co., was organized on or about October 5, 1906. Denies the remaining allegations in paragraph 5, (a).

5, (b) Answering the allegations in paragraph 5, (b), he admits that a deficiency letter was addressed to the San Joaquin Fruit & Investment Co. on or about July 27, 1925. He further admits that within the period prescribed by law within which to file an appeal, said San Joaquin Fruit & Investment Co. filed a petition with the United States Board of Tax Appeals covering the years 1918 and 1919. Denies the remaining allegations in paragraph 5, (b).

5, (c) For lack of information upon which to base a belief, denies the remaining allegations in paragraph 5, (c).

[42] 5, (d), (e) Denies the allegations in paragraph 5, (d) and (e).

5, (f) Answering the allegations in paragraph 5, (f), he admits that taxpayer has been accorded special assessment. Denies the remaining allegations in paragraph 5, (f).

Denies generally and specifically each and every allegation in taxpayer's amended petition not hereinbefore expressly admitted, qualified or denied, and respondent further says that petitioner should not be heard to assert that it is not the taxpayer in this case, for the reason that the original petition was filed September 10, 1925, in which original petition the taxpayer asserted that it was formerly the San Joaquin Fruit & Investment Co., implying

thereby that San Joaquin Fruit & Investment Co. was merely a change in name. Respondent further says that heretofore, to wit, on May 3, 1927, the taxpayer did engage in the trial on the merits of its case in so far as questions other than special assessment were concerned and that it should not therefore be now heard to assert that it is not the taxpayer involved in this appeal.

WHEREFORE, it is prayed that the amended petition be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

7/9/28

Now, Dec. 18, 1930, the foregoing answer to amended petition certified from the record as a true copy.

[Seal] _____,
Clerk, U. S. Board of Tax Appeals.

[43] Filed Sept. 10, 1925. U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 6989.

Appeal of SAN JOAQUIN FRUIT AND INVESTMENT Co. (Formerly SAN JOAQUIN FRUIT CO.), Tustin, California.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:E:SM–CLB–C584–60D) dated July 27, 1925, and as the basis of its appeal sets forth the following:

1. The taxpayer is a California corporation with principal office in the city of Tustin, California.

2. The deficiency letter (a copy of which is attached, together with copy of Bureau letter dated June 16, 1925, referred to therein), was mailed to the taxpayer on July 27, 1925.

3. The taxes in controversy are income and profits taxes for the calendar year 1920 and are more than $10,000.00, to wit: $22,872.09 for the calendar year 1920, together with such additional sums as the Board may find to be legally refundable.

4. The determination of tax contained in the said deficiency letter is based upon the following errors:

(a) That the Commissioner has refused to permit the taxpayer to include in its invested capital for the year 1920 the sum of $1,659,372.85, which represents a disallowance of surplus arising from a closed transaction which occurred on November 30, 1916, on which date the taxpayer exercised an option to acquire improved real estate, which option had been acquired on October 13, 1906, and had steadily and continuously increased in value through the ten-year period, and on the date of its exercise had a market value of $1,659,372.85.

(b) That the Commissioner has refused to permit the taxpayer to take a depreciation deduction for the year 1920, based on the value of fruit-trees at November 30, 1916, on which date title to the trees was acquired by the taxpayer, by exercise of said valuable option.

[44] (c) That the Commissioner has refused to permit the taxpayer to take a depreciation deduction for the year 1920, based on a March 1, 1913, value of fruit-trees included in a leasehold and option owned by the taxpayer on March 1, 1913, which leasehold and option was converted into fee simple ownership on November 30, 1916.

(d) That although the Commissioner has determined the taxpayer's income and profits tax liability for the year 1920, under the provisions of Sections 327 and 328 of the Revenue Act of 1918, the corporations selected by the Commissioner for this

purpose under the provisions of Section 328 did not constitute representative corporations engaged in the same line of business.

5. The facts upon which the taxpayer relies as the basis of its appeal are as follows:

(A) The taxpayer is engaged in the cultivation and sale of citrus fruits and nuts. During the year 1920 it owned in fee simple 1,000 acres of real estate of which 600 acres were planted to walnut trees and 400 acres to orange trees. The corporation was organized October 5, 1906, with a paid-in capital of $81,000.00. The entire capital stock was issued in equal parts to C. E. Utt, Sherman Stevens and James Irvine. The stock issued to James Irvine was shortly afterwards transferred to the Irvine Co. The Irvine Company (referred to hereinafter as the lessor) leased to the taxpayer for a term of ten years, beginning December 1, 1906, and ending November 30, 1916, 1,000 acres of land situated in Orange County, California, upon the following terms:

1. The taxpayer should, at its own expense, set out and plant within four years from the date thereof, all of said land in fruit-trees of various varieties and should properly care for irrigating and cultivating the same and replace all trees that died during the ten-year term of the lease.

2. The taxpayer should also, at its own expense, and during the said term, cultivate crops of grain, beans, peanuts or other products on such portions of land as could be cultivated without material in-

jury to the trees, and prepare such crops for the market at its own expense.

3. A quarter share of said crops including nuts and fruits should be paid to the lessor by the taxpayer as rental.

4. The taxpayer should agree to use every reasonable means to prevent the growth and spread of obnoxious weeds, and under certain conditions if such weeds were not checked, the crop rental was increased to one-half the average total amount produced per acre.

5. The taxpayer should not assign said lease or sublet any portion of the leased premises without the written consent of the lessor.

[45] 6. The taxpayer should, at its own expense, sink wells upon adjacent property owned by the lessor and develop sufficient water for the irrigation of all crops and trees grown upon said land, and construct at its own cost pipe-lines to conduct the water developed thereby to the said leased land, an option to purchase the lands whereon water had been developed by the taxpayer being granted by the lessor.

7. Upon satisfaction of all the conditions of the lease the taxpayer should have the option to purchase any part or all of the leased lands on the last day of the lease at $200.00 per acre, payable ¼ cash on the exercise of the option and the balance in two equal payments within five years after date of purchase, the deferred payments to bear interest at 6% per annum.

8. In the event that the taxpayer should not exercise its option to purchase said leased lands, then upon the expiration of the term of the lease, the lessor should have the option of purchasing from the taxpayer its entire water system and the water developed, upon the payment of the actual cost thereof, less depreciation.

9. The lease also provided that at any time after the entire 1,000 acres were set out to trees, and before the expiration of the lease, the taxpayer might purchase not to exceed ½ of the said leased lands upon the payment to the lessor of $200.00 per acre cash; but if such option were exercised then the option to purchase the balance of the land at the expiration of the lease was terminated.

10. After the expiration of the term of the lease, said option should cease and terminate as to the portion of said lands not purchased thereunder.

11. During the term of the lease all taxes upon the real estate were payable by the lessor and all taxes upon the improvements were payable by the taxpayer.

In accordance with the terms of the above contract the taxpayer corporation took possession of the leased property on or about November 1, 1906. The land at this time was dry and unirrigated. A portion of it had been previously grown to crops of grain and beans but the remainder was still covered with cactus. Within six months' time the taxpayer cleared the land, filled in gulches, leveled the property for irrigation and set out 740 acres to trees. Before the end of the first year the irrigat-

ing system was so far advanced that water was being delivered to the highest portion of the land. Before the end of the third year the remaining 260 acres of land were planted to orchard trees.

[46] During the ten-year period covered by the lease the entire time of two of the stockholders, Messrs. Utt and Stevens, was devoted to the affairs of the corporation, for which they received no compensation except nominal salaries of $100.00 per month each in the nature of drawing accounts for living expenses.

Before the expiration of the lease the property had been highly improved, including the installation of a complete underground irrigation system, electric lights and electric power, modern houses and rooms, dining-room for employees, maintenance of a large automobile bus for the benefit of school children, postoffice for employees and the employment of a gardener to maintain the appearance of the property immediately adjacent to the ranch headquarters.

On November 30, 1916, the taxpayer's option to purchase the property was exercised and the first payment of $75,000.00 provided by the contract was made. The second and final payments of 50,000.00 and $75,000.00 were made on December 31, 1917, and October 28, 1918, respectively.

On November 30, 1916, the value of the real estate and trees thus acquired by the corporation was $1,854,000.00 as determined by independent appraisal.

In its original return for the year 1920 the tax-

payer claimed as a part of its invested capital a paid-in surplus of $1,554,530.07, which represents the difference between the sum of $200,000.00 paid in cash as a portion of the purchase price of the property on November 30, 1916, and the value placed by the corporation on the real estate and trees on that date. Under date of January 25, 1922, the taxpayer revised its claim on the basis of independent appraisals and sought to obtain paid-in surplus in the sum of $1,659,372.85. The report of an Internal Revenue Agent dated November 14, 1921, disallowed the claim for paid-in surplus and the action of the examining agent in this respect was upheld by the Income Tax Unit. The application of the taxpayer for a hearing before the Solicitor of Internal Revenue was denied by the Income Tax Unit and the final computations set forth in the Internal Revenue Bureau's letter of July 27, 1925, make no allowance for any portion of the paid-in surplus claimed by the taxpayer.

Upon the exercise of said option, and ever since, this taxpayer corporation has had, and is entitled to include in its invested capital, earned surplus and undivided profits amounting to not less than $1,659,372.85 arising from the conversion of capital assets.

(B) In its original return for the year 1920 the taxpayer deducted depreciation of $59,710.96 covering depreciation of its physical properties including trees. This deduction was reduced to $58,135.69 by the Revenue Agent, but the Commissioner eliminated the major portion of the depreciation deduc-

tion applicable to the taxpayer's orchard trees and did not give effect to the value of these assets at date of acquisition in establishing the deduction for depreciation. Said value as determined by independent appraisal was $1,100.00 per acre and the life of the trees was approximately 25 years from November 30, 1916.

[47] (C) The value of the orchard trees leased to the taxpayer on March 1, 1913, and to which title was acquired by the taxpayer on November 30, 1916, was $1,115.00 per acre. In the report of the Internal Revenue Agent dated November 14, 1921, referred to hereinabove, depreciation on orchard trees at the rate of 3% was allowed upon a value of $1,115.00 per acre, which the agent upon investigation found to be conservative based on a life of 33⅓ years. In computing the depreciation deduction based on the 1913 value the agent erred in using the rate of 3% for the reason that of the estimated life of the trees approximately five years had elapsed prior to March 1, 1913. Consequently the annual rate of depreciation based on the 1913 value should be increased to 3½. However, the Income Tax Unit refused to consider the value at March 1, 1913, in establishing tree depreciation for the reason that title to the property was not acquired by the taxpayer until November 30, 1916. As indicated hereinabove, the taxpayer owned a property right on March 1, 1913, which was exchanged for a greater property right on November 30, 1916; but the Commissioner has not given effect either to the value of property rights at March 1,

1913, or November 30, 1916, in establishing the depreciation deduction.

(D) The taxpayer's application for assessment under the provisions of Section 327 and 328 of the Revenue Act of 1918 was favorably entertained by the Commissioner, who determined that abnormalities of invested capital were present for the year 1920, entitling the taxpayer to assessment under these sections. A careful and diligent inquiry discloses the fact that the representative companies whose circumstances were similar to the taxpayer during the years in question failed to pay the rate of excess profits tax stated by the Commissioner to constitute the fair comparative rate.

6. The taxpayer in support of its appeal relies upon the following propositions of law:

(A) 1. Where a corporation exercises a valuable long term option to acquire property under lease to said corporation (which option has greatly and steadily increased in market value throughout the term thereof), the consideration being cash, together with the performance of covenants contained in the lease and option contract, and where such covenants require intensive development of such leased property, its complete operation and the assumption of business hazards during the life of the lease and option, the difference between the cash consideration and the value of the assets acquired represents a portion of the corporation's invested capital under the purview of Section 326 (a) (3) of the Revenue Act of 1918, particularly if and when that difference is equivalent to the market value of the option exercised.

2. Where a corporation exchanges cash and assets other than cash, which other assets have a definite market value, for property having a different form and identity in a *bona fide* transaction with a third person, then the aggregate of the cash and the market value of assets other than cash is the capital invested by the corporation in the property received in exchange.

[48] (B) 1. Where a corporation exercises a valuable long term option to acquire property under lease to said corporation (which option has greatly and steadily increased in market value throughout the term thereof), the consideration being cash, together with the performance of covenants contained in the lease contract, and where such covenants consist of the intensive development of such leased property, its complete operation and the assumption of business hazards during the life of the lease, depreciation upon property subject to exhaustion acquired as the result of such a transaction is properly based upon its fair value at the date of acquisition under the purview of Section 234 (a) (7) of the Revenue Act of 1918.

2. Where a corporation acquires property in exchange for other property and the property received in the exchange is such as will physically deteriorate, the corporation is entitled to an allowance for depreciation based on the value of property that it gave in the exchange.

(C) A leasehold is suspectible of depreciation under the purview of Section 234 (a) (7) of the Revenue Act of 1918 and if such leasehold is ex-

changed for absolute ownership of the same property, the taxpayer is not thereby deprived of depreciation based on the March 1, 1913, value of the property.

(D) Where the Commissioner has determined that abnormalities of invested capital or net income exist under the purview of Section 327 (d) of the Revenue Act of 1918 the Commissioner must compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined and which are as nearly as may be similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, in order to comply with the provisions of Section 328 (a) of the Revenue Act of 1918.

WHEREFORE, the taxpayer respectfully prays that this Board may hear and determine its appeal.

Respectfully submitted,

N. L. McLAREN,
GEORGE M. NAUS,
Counsel for the Taxpayer.

State of California,
County of Orange,—ss.

C. E. Utt, being duly sworn says that he is the President of the San Joaquin Fruit and Investment Company, a successor to the San Joaquin Fruit Company, the taxpayer named in the foregoing petition and as such President is duly authorized to verify the foregoing petition; that he has read the said petition or had the same read to him and is familiar with the statements therein contained

and that the facts therein stated are true, except such facts as are stated to be upon information and belief and these facts he believes to be true.

C. E. UTT,
President.

Subscribed and sworn to before me this 2d day of September, 1925.

[Seal] W. S. LEINBERGER,
Notary Public.

My commission expires Aug. 16, 1928.

[49] TREASURY DEPARTMENT,
Washington.

July 27, 1925.

IT:E:SM.
CLB.–C584–60D.
San Joaquin Fruit and Investment Company,
Tustin, California.

Sirs: An audit of your income and profits tax return for the year ended December 31, 1920 has resulted in the determination of a deficiency in tax of $22,872.09 as shown in Bureau letter dated June 16, 1925.

(Here follows regular 60-day letter.)

Respectfully,
D. H. BLAIR,
Commissioner.
By (Signed) C. B. ALLEN,
Acting Deputy Commissioner.

Enclosures:
Statements
Agreement—Form A.

[50] IT:E:SM.
CLB.–C584–60D.

SAN JOAQUIN FRUIT AND INVESTMENT CO.,
Tustin, California

Year Involved.	Deficiency in Tax.
Calendar year 1920	$22,872.09

No additional information having been submitted relative to your application for the assessment of your profits tax for the calendar year 1920 under the provisions of Section 328 of the Revenue Act of 1918, the Bureau holds that the action of the Unit as set forth in Bureau letter dated June 16, 1925 is correct and should be sustained.

[51] June 16, 1925.

TREASURY DEPARTMENT,
Washington.

IT:E:SM.
CLB.–C–584.
San Joaquin Fruit and Investment Co.
Tustin, California.

Sirs: An audit of your income and profits tax return for the year ended December 31, 1920 has resulted in the determination of a deficiency in tax of $22,872.09 as shown in the attached statement.

(Here follows regular 30-day letter.)

Respectfully,
J. G. BRIGHT,
Deputy Commissioner.
By (Signed) I. T. ENES,
Chief of Section.

[52] STATEMENT.

In re: SAN JOAQUIN FRUIT AND INVESTMENT CO.,
Tustin, California.
1920.

Deficiency in Tax $22,872.09

You are advised that after careful consideration and review, your application under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of Revenue Act of 1918 has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

Net income as shown by Bureau letter dated November 2, 1922		$184,137.82	
Less: Interest on Obligations of the U. S. not exempt	$ 347.41		
Profits tax (Section 328)	20,522.92		$20,522.92
Exemption	2,000.00	22,870.33	
Taxable at 10%		$161,267.49	16,126.75
Total tax assessable			$36,649.67
Tax Assessed, Account #400606			13,777.58
Deficiency in Tax			$22,872.09

Now, Dec. 18, 1930, the foregoing petition certified from the record as a true copy.

[Seal] ——————————,
Clerk, U. S. Board of Tax Appeals.

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[53] Filed Oct. 1, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 6989.

Appeal of SAN JOAQUIN FRUIT & INVESTMENT CO., Tustin, Calif.

ANSWER.

Comes now the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(1) Admits the statements contained in paragraphs 1, 2 and 3 of the petition.

(2) Admits that the taxpayer is engaged in the cultivation of citrus fruits and nuts.

(3) Admits that the taxpayer was organized as a corporation on or about October 5, 1906, with a paid-in capital stock of $81,000.

(4) Admits that the taxpayer leased from the Irvine Company 1,000 acres of land for a term of 10 years beginning on or about December 1, 1906 and ending on or about November 30, 1916.

(5) Admits that the taxpayer had an option to purchase the said 1,000 acres of land at a price of $200.00 per acre.

(6) Admits that the taxpayer operated under this lease as claimed in the taxpayer's petition.

(7) Admits that on November 30, 1916, the taxpayer exercised its option under its agreement and purchased the said 1,000 acres of land, together with the improvements thereon, for the agreed sum [54] of $200,000.00 and that that consideration was paid and payable as specified in the taxpayer's petition.

(8) Admits that the Commissioner in the computation of the taxpayer's invested capital for the taxable years involved, allowed only $200,000.00 representing the cost of the land, together with the improvements thereon.

(9) Admits that the Commissioner in determining the taxpayer's depreciation predicated the amount of depreciation allowable upon the basis of the cost of the land and improvements thereon of $200,000.00.

(10) Denies that the cost to the taxpayer of the 1,000 acres of land, together with the improvements thereon, was in excess of $200,000.00.

(11) Denies that on the date the taxpayer exercised its option to purchase the 1,000 acres of land, together with improvements thereon for a purchase price of $200,000.00, that the appraised value of the land, together with improvements thereon, was $1,854,000.00, or, that if it were, it is material or relevant to the issue in controversy.

(12) Denies that the cost of the depreciable assets as determined by the Commissioner is not the true cost thereof.

(13) Denies that the appraised value of the de-

preciable assets on the 1,000 acres of land was $1100.00 per acre, or, that if it were, it is material or relevant to the issue in controversy.

(14) Denies that the March 1, 1913 value of the orchard trees on the land was $1,115.00 per acre, or, that if it were, it is material or relevant to the issue in controversy.

(15) Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

[55] PROPOSITIONS OF LAW.

(1) Only the cost of an asset purchased by a taxpayer may be included in the taxpayer's assets in the determination of the taxpayer's invested capital under the provisions of Sections 325–326 of the Revenue Act of 1918.

(2) Appreciation of an asset purchased under an option agreement, which appreciation occurs from the date the option is taken to the date of the exercise thereof, does not constitute either paid-in surplus or earned surplus.

(3) Depreciation may be predicated only upon the cost of property acquired subsequent to March 1, 1913.

(4) The Commissioner has allowed a reasonable amount of depreciation as a deduction.

(5) The taxpayer is not entitled to any other or further relief in the determination of its profits tax for the year 1920 than has been allowed by the Commissioner.

WHEREFORE, it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of Counsel:

WARD LOVELESS,
Special Attorney,
Bureau of Internal Revenue.

WL/mvb.

Now, Dec. 18, 1930, the foregoing answer certified from the record as a true copy.

[Seal] ————————————,
Clerk, U. S. Board of Tax Appeals.

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[56] Filed Apr. 4, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 6989.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION FOR LEAVE TO AMEND.

Comes now the above-named petitioner, by its attorneys, and moves the Board that it be granted permission to amend and file its petition in accord-

ance with the completed amended petitions attached hereto.

(Signed) DANA LATHAM.
DANA LATHAM,
Title Insurance Building,
Los Angeles, Calif.
(Signed) F. O. GRAVES.
F. O. GRAVES,
c/o Miller & Chevalier,
Southern Bldg.,
Washington, D. C.
Of Counsel.

Motion dated April 2, 1928.
Granted Apr. 5, 1928.
(Signed) B. H. LITTLETON,
Member, U. S. Board of Tax Appeals.

Now, Dec. 18, 1930, the forgoing motion for leave to amend and order granting same, certified from the record as a true copy.

[Seal] _____,
Clerk, U. S. Board of Tax Appeals.

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[57] United States Board of Tax Appeals.

DOCKET No. 6989.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDED PETITION.

The above-named petitioner hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:E:SM. –CLB.–C584–60D.) dated July 27, 1925, and as the basis of its appeal sets forth the following:

1. The petitioner is a California corporation which was organized on or about July 24, 1922 and which was not in existence during the taxable year 1920.

2. The deficiency letter (copy of which is attached and marked Exhibit "A") was mailed to the petitioner on July 27, 1925.

3. The taxes in controversy are not taxes of your petitioner but appear to be income and profits taxes for the calendar year 1920, assessable, if at all, against the San Joaquin Fruit Company, a corporation other than the corporation to whom the aforesaid deficiency letter was addressed, and are more than $10,000.00 to wit: $22,872.09 for the calendar year 1920.

4. The determination of tax contained in the said deficiency letter is based upon the following errors:

[58] (a) That the petitioner was not in existence during the year in question and hence could not be liable as a taxpayer for any alleged deficiency;

(b) That the San Joaquin Fruit Company was dissolved as a corporation during the year 1922 and its existence was then and there terminated;

(c) That the deficiency letter in question was received by the petitioner during the year 1925, prior to the passage of the Revenue Act of 1926, and that under the provisions of the Revenue Act of 1924 there can be no liability upon the petitioner as a transferee of assets for taxes alleged to be due from a transferor, even though it should be assumed that Section 280 of the Revenue Act of 1926 is constitutional and is applicable to the facts herein involved;

(d) That the Commissioner is attempting to exercise judicial power in violation of Section 1 of Article 3 of the Constitution of the United States;

(e) That said Section 280 is without retroactive application to a transfer completed before the effective date of said Section 280;

(f) That upon information and belief petitioner alleges there is no tax liability due from the San Joaquin Fruit Company for the year 1920, for the following reasons:

(1) That the Commissioner failed and refused to permit the San Joaquin Fruit Company to include in its invested capital for the calendar year 1920 the sum of $1,659,372.85, which represents the disallowance of surplus arising from a closed transaction which occurred on November 30, 1916, on which date the San Joaquin Fruit Company exercised an option to acquire certain improved real estate, which option had been acquired on October 13, 1906, [59] and had steadily and continuously increased in value through the ten-year period and on the date of its exercise had a market value of $1,659,372.85.

(2) That the Commissioner has failed and refused to permit the San Joaquin Fruit Company to deduct depreciation for the year 1920 based on the value of fruit-trees at November 30, 1916, on which date title to the trees was acquired by the San Joaquin Fruit Company by exercise of said option.

(3) That the Commissioner has failed and refused to permit the San Joaquin Fruit Company to deduct depreciation for the year 1920 based on a March 1, 1913, value of fruit-trees included in a leasehold and option owned by the San Joaquin Fruit Company on March 1, 1913, which leasehold and option were converted into fee-simple ownership on November 30, 1916.

(4) That although the Commissioner has determined the San Joaquin Fruit Company's income and profits tax liability for the year 1920 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 the corporations selected by the Commissioner for this purpose under the provisions of Section 328 did not constitute representative corporations engaged in the same line of business.

(g) That upon information and belief petitioner alleges that the statute of limitations has run against the collection of any deficiency in tax for the year in question from the San Joaquin Fruit Company, in that no assessment was made nor any deficiency letter mailed to it within five years after the return was filed by it for the taxable year 1920.

(h) That the statute of limitations has run against the collection of any deficiency in tax for the year in question from the petitioner under the

provisions of Section 280 of the Revenue Act of 1926, or any other [60] applicable provision of law, in that no assessment of liability as a transferee of property of the taxpayer, San Joaquin Fruit Company, a corporation, or otherwise or at all, was made or levied within one year after the expiration of the period of limitation for assessment against the said San Joaquin Fruit Company.

(i) That the Commissioner of Internal Revenue was, and is, without jurisdiction of the subject matter of an alleged liability of petitioner, either as an alleged taxpayer or as an alleged transferee of assets, in the premises.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The San Joaquin Fruit Company was organized on or about October 5, 1906. During the period from December 1, 1906, until its dissolution on December 26, 1922, it was engaged in the orchard business. The San Joaquin Fruit and Investment Company, which was incorporated on or about July 24, 1922, acquired the operating properties of the San Joaquin Fruit Company in exchange for stock on or about November 6, 1922, but assumed no liabilities of the San Joaquin Fruit Company at this or any other date.

(b) The San Joaquin Fruit Company made Federal income and profits tax returns for the calendar year 1920 on, to wit: March 15, 1921. Thereafter the Commissioner of Internal Revenue caused the books of the San Joaquin Fruit Company to be examined by an Internal Revenue Agent and as a

result of this examination asserted an additional tax liability on the part of the said San Joaquin Fruit Company for the year in question. Thereafter, a series of conferences was held in Washington, D. C., in the offices of the Internal [61] Revenue Bureau followed by the issuance by the Commissioner of a so-called deficiency letter for the year 1920 dated July 27, 1925. Said deficiency letter was addressed to the San Joaquin Fruit and Investment Company. Within the period prescribed by law within which to file an appeal, the San Joaquin Fruit and Investment Company filed a petition with the United States Board of Tax Appeals covering the year 1920, in which it set forth certain facts relating to the San Joaquin Fruit Company.

(c) The San Joaquin Fruit Company was engaged in the cultivation and sale of citrus fruits and nuts. During the year 1920 it owned in fee simple 1,000 acres of real estate of which 600 acres were planted to walnut trees and 400 acres to orange trees. The corporation was organized October 5, 1906, with a paid-in capital of $81,000.00. The entire capital stock was issued in equal parts to C. E. Utt, Sherman Stevens and James Irvine. The stock issued to James Irvine was shortly afterwards transferred to the Irvine Company. The Irvine Company (referred to hereinafter as the lessor) leased to the San Joaquin Fruit Company for a term of ten years, beginning December 1, 1906, and ending November 30, 1916, 1,000 acres of land

situated in Orange County, California, upon the following terms:

1. The San Joaquin Fruit Company should, at its own expense, set out and plant within four years from the date thereof, all the said land in fruit-trees of various varieties and should properly care for irrigating and cultivating the same and replace all trees that died during the ten-year term of the lease.

2. The San Joaquin Fruit Company should also, at its own expense, and during the said term, cultivate crops of grain, [62] beans, peanuts or other products on such portions of land as could be cultivated without material injury to the trees, and prepare such crops for the market at its own expense.

3. A quarter share of said crops including nuts and fruits should be paid to the lessor by the San Joaquin Fruit Company as rental.

4. The San Joaquin Fruit Company should agree to use every reasonable means to prevent the growth and spread of obnoxious weeds, and under certain conditions if such weeds were not checked, the crop rental was increased to one-half the average total amount produced per acre.

5. The San Joaquin Fruit Company should not assign said lease or sublet any portion of the leased premises without the written consent of the lessor.

6. The San Joaquin Fruit Company should, at its own expense, sink wells upon adjacent property owned by the lessor and develop sufficient water for the irrigation of all crops and trees grown upon said

land, and construct at its own cost pipe-lines to conduct the water developed thereby to the said leased land, an option to purchase the lands whereon water had been developed by the San Joaquin Fruit Company being granted by the lessor.

7. Upon satisfaction of all the conditions of the lease the San Joaquin Fruit Company should have the option to purchase any part or all of the leased lands on the last day of the lease at $200.00 per acre, payable ¼ cash on the exercise of the [63] option and the balance in two equal payments within five years after date of purchase, the deferred payments to bear interest at 6% per annum.

8. In the event that the San Joaquin Fruit Company should not exercise its option to purchase said leased lands, then upon the expiration of the term of the lease, the lessor should have the option of purchasing from the San Joaquin Fruit Company its entire water system and the water developed, upon the payment of the actual cost thereof, less depreciation.

9. The lease also provided that at any time after the entire 1,000 acres were set out to trees, and before the expiration of the lease, the San Joaquin Fruit Company might purchase not to exceed ½ of the said leased lands upon the payment to the lessor of $200.00 per acre cash; but if such option were exercised then the option to purchase the balance of the land at the expiration of the lease was terminated.

10. After the expiration of the term of the lease,

said option should cease and terminate as to the portion of said lands not purchased thereunder.

11. During the terms of the lease all taxes upon the real estate were payable by the lessor and all taxes upon the improvements were payable by the San Joaquin Fruit Company.

In accordance with the terms of the above contract the San Joaquin Fruit Company took possession of the leased property on or about November 1, 1906. The land at this time was dry and unirrigated. A portion of it had been previously grown to crops of grain and beans but the remainder was still covered with cactus. Within six months' time the San Joaquin Fruit Company cleared [64] the land, filled in gulches, leveled the property for irrigation and set out 740 acres to trees. Before the end of the first year the irrigating system was so far advanced that water was being delivered to the highest portion of the land. Before the end of the third year the remaining 260 acres of land were planted to orchard trees.

During the ten-year period covered by the lease the entire time of two of the stockholders, Messrs. Utt and Stevens, was devoted to the affairs of the corporation, for which they received no compensation except nominal salaries of $100.00 per month each in the nature of drawing accounts for living expenses.

Before the expiration of the lease the property had been highly improved, including the installation of a complete underground irrigation system, electric lights and electric power, modern houses

and rooms, dining-room for employees, maintenance of a large automobile bus for the benefit of school children, postoffice for employees and the employment of a gardener to maintain the appearance of the property immediately adjacent to the ranch headquarters.

On November 30, 1916, the San Joaquin Fruit Company's option to purchase the property was exercised and the first payment of $75,000.00 provided by the contract was made. The second and final payments of $50,000.00 and $75,000.00 were made on December 31, 1917 and October 28, 1918 respectively.

On November 30, 1916, the value of the real estate and trees thus acquired by the corporation was $1,854,000.00 as determined by independent appraisal.

In its original return for the year 1920 the San Joaquin Fruit Company claimed as a part of its invested capital a paid-in surplus of $1,554,530.07 which represents the difference between the sum of $200,000.00 paid in cash as a portion of the purchase price of the property on November 30, 1916, and the [65] value placed by the corporation on the real estate and trees on that date. Under date of January 25, 1922, the company revised its claim on the basis of independent appraisals and sought to obtain paid-in surplus in the sum of $1,659,372.85. The report of an Internal Revenue Agent dated November 14, 1921 disallowed the claim for paid-in surplus and the action of the examining agent in this respect was upheld by the Income Tax

Unit. The application of the San Joaquin Fruit Company for a hearing before the Solicitor of Internal Revenue was denied by the Income Tax Unit and the final computations set forth in the Internal Revenue Bureau's letter of July 21, 1925, make no allowance for any portion of the paid-in surplus claimed by the San Joaquin Fruit Company.

Upon the exercise of said option, and ever since San Joaquin Fruit Company has had, and is entitled to include in its invested capital, earned surplus and undivided profits amounting to not less than $1,659,372.85 arising from the conversion of capital assets.

(d) In its original return for the year 1920 the San Joaquin Fruit Company deducted depreciation of $59,710.96 covering depreciation of its physical properties including trees. This deduction was reduced to $58,135.69 by the Revenue Agent, but the Commissioner eliminated the major portion of the depreciation deduction applicable to the San Joaquin Fruit Company's orchard trees and did not give effect to the value of these assets at date of acquisition in establishing the deduction for depreciation. Said value as determined by independent appraisal was $1,100 per acre and the life of the trees was approximately 25 years from November 30, 1916.

(e) The value of the orchard trees leased on the San Joaquin Fruit Company on March 1, 1913 and to which title was acquired by it on November 30, [66] 1916, was $1,115.00 per acre. In the

report of the Internal Revenue Agent dated November 14, 1921, referred to hereinabove, depreciation on orchard trees at the rate of 3% was allowed upon a value of $1,115.00 per acre, which the agent upon investigation found to be conservative based on a life of 33⅓ years. In computing the depreciation deduction based on the 1913 value the agent erred in using the rate of 3% for the reason that of the estimated life of the trees approximately five years had elapsed prior to March 1, 1913. Consequently the annual rate of depreciation based on the 1913 value should be increased to 3½%. However, the Income Tax Unit refused to consider the value at March 1, 1913, in establishing tree depreciation for the reason that title to the property was not acquired by the San Joaquin Fruit Company until November 30, 1916. As indicated hereinabove, the San Joaquin Fruit Company owned a property right on March 1, 1913, which was exchanged for a greater property right on November 30, 1916; but the Commissioner has not given effect either to the value of property rights at March 1, 1913, or November 30, 1916, in establishing the depreciation deduction.

(f) The San Joaquin Fruit Company's application for assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918 was favorably entertained by the Commissioner, who determined that abnormalties of invested capital were present for the year 1920 entitling the San Joaquin Fruit Company to assessment under these sections. A careful and diligent inquiry discloses

the fact that the representative companies whose circumstances were similar to the San Joaquin Fruit Company during the year in question failed to pay the rate of excess profits tax stated by the Commissioner to constitute the fair comparative rate.

[67] All facts stated hereinabove which relate to the San Joaquin Fruit Company are, for the purpose of this petition, stated to be upon information and belief, because the San Joaquin Fruit Company, a dissolved corporation, was the real taxpayer and not the petitioner.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and hold as follows:

(a) That no deficiency in tax on the part of the San Joaquin Fruit and Investment Company as a taxpayer exists for the year in question.

(b) That no deficiency in tax, nor any liability, on the part of the San Joaquin Fruit and Investment Company as a transferee exists for the year in question.

(c) That the Commissioner of Internal Revenue is without jurisdiction as hereinabove alleged.

(d) That assessment of the taxes in controversy against San Joaquin Fruit Company, a corporation, is barred by limitation of time, under Section 277 of the Revenue Act of 1926.

(e) That assessment of any alleged liability against petitioner as a transferee of property of said taxpayer is barred by limitation of time under Section 280 of the Revenue Act of 1926.

(f) That no tax liability is due from the San Joaquin Fruit Company for the following reasons:

(1) That the San Joaquin Fruit Company is entitled to paid-in surplus in the sum of $1,659,-372.85 for the calendar year 1920.

(2) That the San Joaquin Fruit Company is entitled to depreciation for the year 1920 based on the November 30, 1916 value of its orchard trees.

[68] (3) That the San Joaquin Fruit Company is entitled to depreciation for the year 1920 based on the March 1, 1913, value of its leasehold and option.

(4) That the San Joaquin Fruit Company is entitled to additional relief for the year 1920 under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

(g) That judgment of this Board be entered herein in favor of petitioner.

(Signed) N. L. McLAREN.
N. L. McLAREN, C. P. A.,
444 California Street,
San Francisco, California,
(Signed) GEORGE M. NAUS.
GEORGE M. NAUS, Atty.-at-Law,
582 Market Street,
San Francisco, California,
(Signed) DANA LATHAM.
DANA LATHAM, Atty.-at-Law,
Title Insurance Building,
Los Angeles, California,
Counsel for Petitioner.

State of California,
County of Orange,—ss.

C. E. Utt, being duly sworn, says that he is the President of the [69] San Joaquin Fruit & Investment Company, successor to the San Joaquin Fruit Company, the petitioner above named, and as such President is duly authorized to verify the foregoing petition. That he has read the foregoing petition or had the same read to him and is familiar with the statements contained therein and that the facts stated are true, except as to those facts stated to be upon information and belief and those facts he believes to be true.

C. E. UTT.

Subscribed and sworn to before me this 23d day of March, 1928.

[Seal] W. S. LEINBERGER,
Notary Public.

My commission expires Aug. 16, 1928.

[70] EXHIBIT "A."

TREASURY DEPARTMENT,
Washington.

July 27, 1925.

IT:E:SM.
CLB.–C584–60D.
San Joaquin Fruit and Investment Co.,
Tustin, California.

Sirs: An audit of your income and profits tax return for the year ended December 31, 1920, has

resulted in the determination of a deficiency in tax of $22,872.09 as shown in Bureau letter dated June 16, 1925.

(Here follows regular 60-day letter.)

Respectfully,
D. H. BLAIR,
Commissioner.
By (Signed) C. B. ALLEN,
Acting Deputy Commissioner.

Enclosures:
Statements.
Agreement—Form A.

[71] IT:E:SM.
CLB.–C584–60D.

SAN JOAQUIN FRUIT AND INVESTMENT CO.,
Tustin, California.

Year Involved	Deficiency in Tax
Calendar year 1920	$22,872.09

No additional information having been submitted relative to your application for the assessment of your profits tax for the calendar year 1920 under the provisions of Section 328 of the Revenue of 1918, the Bureau holds that the action of the Unit as set forth in Bureau letter dated June 16, 1925, is correct and should be sustained.

[72] TREASURY DEPARTMENT,
Washington.

June 16, 1925.

IT:E:SM.
CLB.–C–584.
San Joaquin Fruit and Investment Co.,
Tustin, California.

Sirs: An audit of your income and profits tax return for the year ended December 31, 1920, has resulted in the determination of a deficiency in tax of $22,872.09 as shown in the attached statement.

(Here follows regular 30-day letter.)

Respectfully,
J. G. BRIGHT,
Deputy Commissioner.
By (Signed) I. T. ENES,
Chief of Section.

[73] STATEMENT.

In re: SAN JOAQUIN FRUIT & INVESTMENT CO.
Tustin, California.
1920.

Deficiency in Tax $22,872.09

You are advised that after careful consideration and review, your application under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of the Revenue Act of 1918 has been allowed. Your profits tax is based

upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above mentioned provisions is as follows:

Net income as shown by Bureau letter dated November 2, 1922		$184,137.82	
Less: Interest on Obligations of the U. S. not exempt	$ 347.41		
Profits tax (Section 328)	20,522.92		$20,522.92
Exemption	2,000.00	22,870.33	
Taxable at 10%		$161,267.49	16,126.75
Total tax assessable			$36,649.67
Tax assessed, Account #400606			13,777.58
Deficiency in Tax			$22,872.09

Now, Dec. 18, 1930, the foregoing amended petition certified from the record as a true copy.

[Seal] _____,

Clerk, U. S. Board of Tax Appeals.

[74] Filed Jul. 9, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 6989.

SAN JOAQUIN FRUIT & INVESTMENT CO.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER TO AMENDED PETITION.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1. Denies the allegations in paragraph 1.

2. Admits the allegations in paragraph 2.

3. Answering the allegations in paragraph 3, he admits that the taxes in controversy are for the calendar year 1920. Denies the remaining allegations in paragraph 3.

5. (a) Answering the allegations in paragraph 5, (a), he admits that the San Joaquin Fruit Co. was organized on or about October 5, 1906. Denies the remaining allegations in paragraph 5, (a).

5. (b) Answering the allegations in paragraph 5, (b), he admits that a deficiency letter was addressed to the San Joaquin Fruit & Investment Co. on or about July 27, 1925. He further admits

that within the period prescribed by law within which to file an appeal, said San Joaquin Fruit & Investment Co. filed a petition with the United States Board of Tax Appeals covering the year 1920. Denies the remaining allegations in paragraph 5, (b).

5. (c) For lack of information upon which to base a belief, denies the allegations in paragraph 5, (c).

5. (d), (e) Denies the allegations in paragraphs 5, (d) and (e).

[75] 5. (f) Answering the allegations in paragraph 5, (f), he admits that taxpayer has been accorded special assessment. Denies the remaining allegations in paragraph 5, (f).

Denies generally and specifically each and every allegation in taxpayer's amended petition not hereinbefore expressly admitted, qualified or denied, and respondent further says that petitioner should not be heard to assert that it is not the taxpayer in this case, for the reason that the original petition was filed September 10, 1925, in which original petition the taxpayer asserted that it was formerly the San Joaquin Fruit & Investment Co. implying thereby that San Joaquin Fruit & Investment Co. was merely a change in name. Respondent further says that heretofore, to wit, on May 3, 1927, the taxpayer did engage in the trial on the merits of its case in so far as questions other than special assessment were concerned and that it should not therefore be now heard to assert that it is not the taxpayer involved in this appeal.

WHEREFORE, it is prayed that the amended petition be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

jaf/7/9/28.

Now, Dec. 18, 1930, the foregoing answer to amended petition certified from the record as a true copy.

[Seal] _____,
Clerk, U. S. Board of Tax Appeals.

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[76] Filed Oct. 25, 1926. U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 20,801.

SAN JOAQUIN FRUIT AND INVESTMENT CO. (Formerly SAN JOAQUIN FRUIT CO.,)

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above-named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:SM–60D–HMW–D–29804) dated September 1, 1926, and as the basis of its proceeding alleges as follows:

1. The taxpayer is a California corporation with principal office in the city of Tustin, California.

2. The notice of deficiency (copy of which is attached marked Exhibit "A," together with copy of Bureau letter dated July 20, 1926, marked Exhibit "B," referred to therein) was mailed to the taxpayer on September 1, 1926.

3. The taxes in controversy are income and profits taxes for the calendar year 1921 and for $21,867.40.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) That the Commissioner has refused to permit the taxpayer to include in its invested capital for the year 1921 the sum of $1,659,372.85 which represents a disallowance of surplus arising from a closed transaction which occurred on November 30, 1916, on which date the taxpayer exercised an option to acquire improved real estate, which option had been obtained on October 13, 1906, and had steadily and continuously increased in value through the ten year period, and on the date of its exercise had a market value of $1,659,372.85.

[77] (b) That the Commissioner has refused to permit the taxpayer to take a depreciation deduction for the year 1921 based on the value of fruit-trees at November 30, 1916, on which date title to the trees was acquired by the taxpayer, by exercise of said valuable option.

(c) That the Commissioner has refused to permit the taxpayer to take a depreciation deduction for the year 1921 based on a March 1, 1913, value of fruit-trees included in a leasehold and option owned by the taxpayer on March 1, 1913, which leasehold and option was converted into fee-simple ownership on November 30, 1916.

(d) That although the Commissioner has determined the taxpayer's income and profits tax liability for the year 1921 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 the corporations selected by the Commissioner for this purpose under the provisions of Section 328 did not constitute representative corporations engaged in the same line of business.

5. The facts upon which the taxpayer relies as the basis of this proceeding are as follows:

(A) The taxpayer is engaged in the cultivation and sale of citrus fruits and nuts. During the year 1921 it owned in fee simple 1,000 acres of real estate of which 600 acres were planted to walnut trees and 400 acres to orange trees. The corporation was organized October 5, 1906, with a Paid-in Capital of $81,000.00. The entire capital stock was issued in equal parts to C. E. Utt, Sherman Stevens and James Irvine. The stock issued to James Irvine

was shortly afterwards transferred to the Irvine Company.

The Irvine Company (referred to hereinafter as the lessor) leased to the taxpayer for a term of ten years, beginning December 1, 1906, and ending November 30, 1916, 1,000 acres of land situated in Orange County, California, upon the following terms:

1. The taxpayer should, at its own expense, set out and plant within four years from the date thereof, all the said land in fruit trees of various varieties and should properly care for irrigating and cultivating the same and replace all trees that died during the ten year term of the lease.

2. The taxpayer should also at its own expense, and during the said term, cultivate crops of grain, beans, peanuts or other products on such portions of land as could be cultivated without material injury to the trees, and prepare such crops for the market at its own expense.

[78] 3. A quarter share of said crops including nuts and fruits should be paid to the lessor by the taxpayer as rental.

4. The taxpayer should agree to use every reasonable means to prevent the growth and spread of obnoxious weeds, and under certain conditions if such weeds were not checked, the crop rental was increased to one-half the average total amount produced per acre.

5. The taxpayer should not assign said lease or submit any portion of the leased premises without the written consent of the lessor.

6. The taxpayer should at its own expense, sink wells upon adjacent property owned by the lessor and develop sufficient water for the irrigation of all crops and trees grown upon said land and construct at its own cost pipe-lines to conduct the water developed thereby to the said leased land, an option to purchase the lands whereon water had been developed by the taxpayer being granted by the lessor.

7. Upon satisfaction of all the conditions of the lease the taxpayer should have the option to purchase any part or all of the leased lands on the last day of the lease at $200.00 per acre, payable ¼ cash on the exercise of the option and the balance in two equal payments within five years after date of purchase, the deferred payments to bear interest at 6% per annum.

8. In the event that the taxpayer should not exercise its option to purchase said leased lands, then upon the expiration of the term of the lease, the lessor should have the option of purchasing from the taxpayer its entire water system and the water developed, upon the payment of the actual cost thereof, less depreciation.

9. The lease also provided that at any time after the entire 1,000 acres were set out to trees, and before the expiration of the lease, the taxpayer might purchase not to exceed ½ of the said leased lands upon the payment to the lessor of $200.00 per acre cash; but if such option were exercised then the option to purchase the balance of the land at the expiration of the lease was terminated.

10. After the expiration of the term of the lease,

said option should cease and terminate as to the portion of said lands not purchased thereunder.

11. During the terms of the lease all taxes upon the real estate were payable by the lessor and all taxes upon the improvements were payable by the taxpayer.

[79] In accordance with the terms of the above contract the taxpayer corporation took possession of the leased property on or about November 1, 1906. The land at this time was dry and unirrigated. A portion of it had been previously grown to crops of grain and beans, but the remainder was still covered with cactus. Within six months' time the taxpayer cleared the land, filled in gulches, leveled the property for irrigation and set out 740 acres to trees. Before the end of the first year the irrigating system was so far advanced that water was being delivered to the highest portion of the land. Before the end of the second year the remaining 260 acres of land were planted to orchard trees.

During the ten year period covered by the lease the entire time of two of the stockholders, Messrs. Utt and Stevens, was devoted to the affairs of the corporation for which they received no compensation except nominal salaries of $100.00 per month, in the nature of drawing accounts for living expenses.

Before the expiration of the lease the property had been highly improved, including the installation of a complete underground irrigation system, electric lights and electric power, sewer system, high pressure fire equipment, modern houses and rooms,

dining-room and general store for employees, maintenance of a large automobile bus for the benefit of school children, postoffice for employees and the employment of a gardener to maintain the appearance of the property immediately adjacent to the ranch headquarters.

On November 30, 1916, the taxpayer's option to purchase the property was exercised and the first payment of $75,000.00 provided by the contract was made. The second and final payments of $50,000.00 and $75,000.00 were made on December 31, 1917, and October 28, 1918, respectively.

On November 30, 1916, the value of the real estate and trees thus acquired by the corporation was $1,854,000.00 as determined by independent appraisal.

In its original return for the year 1921 the taxpayer claimed as a part of its invested capital a Paid-in Surplus of $1,659,372.85 which, subject to minor adjustments, represents the difference between the sum of $200,000.00 paid in cash as a portion of the purchase price of the property on November 30, 1916, and the value placed by the taxpayer on the real estate and trees on that date. The Commissioner of Internal Revenue disallowed the claim for Paid-in Surplus following the examination of an Internal Revenue Agent. The final computations as set forth in the Internal Revenue Bureau's letter of July 20, 1926, make no allowance for any portion of the Paid-in Surplus claimed by the taxpayer.

Upon the exercise of said option, and ever since, the taxpayer corporation has had, and is entitled

to include in its invested capital, earned surplus and undivided profits amounting to not less than $1,659,372.85 arising from the conversion of capital assets.

(B) In its original return for the year 1921 the taxpayer deducted $——— covering depreciation of its fixed assets. The value of the orchard trees at date of their acquisition by the corporation was $1,100 per acre and the life of the trees was approximately 25 years from November 30, 1916. The Commissioner eliminated the major portion of the depreciation deduction applicable to the taxpayer's orchard trees for the year 1921 and did not give effect to the value of these assets at date of acquisition in establishing the deduction for depreciation.

[80] (C) The value of the orchard trees leased to the taxpayer on March 1, 1913, and to which title was acquired by the taxpayer on November 30, 1916, was $1,115.00 per acre. The Commissioner of Internal Revenue refused to consider the value at March 1, 1913, in establishing tree depreciation for the reason that title to the property was not acquired by the taxpayer until November 30, 1916. As indicated hereinabove, the taxpayer owned a property right on March 1, 1913, which was exchanged for a greater property right on November 30, 1916, but the Commissioner has not given effect either to the value of property rights at March 1, 1913, or November 30, 1916, in establishing the depreciation deduction.

(D) The taxpayer's application for assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918 was favorably entertained by the Commissioner, who determined that abnormalities of invested capital were present for the year 1921 entitling the taxpayer to assessment under these sections. A careful and diligent inquiry discloses the fact that the representative companies whose circumstances were similar to the taxpayer during the years in question failed to pay the rate of excess profits tax stated by the Commissioner to constitute the fair comparative rate.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and hold as follows:

(A) That the petitioner is entitled to earned Paid-In Surplus in the sum of $1,659,372.85 in the computation of its invested capital for the year 1921.

(B) That the petitioner is entitled to depreciation for the year 1921 based on the November 30, 1916, value of its orchard trees.

(C) That the petitioner is entitled to depreciation for the year 1921 based on the March 1, 1913, value of its leasehold and option.

(D) That the petitioner is entitled to additional

relief under the provisions of Section 328 of the Revenue Act of 1918.

N. L. McLAREN, C. P. A.
444 California Street,
San Francisco, California,
GEORGE M. NAUS,
Attorney at Law,
Central Bank Building,
Oakland, California,
Counsel for Petitioner.

State of California,
County of Orange,—ss.

C. E. Utt, being duly sworn, says that he is the President of the San Joaquin Fruit and Investment Company, successor to the San Joaquin Fruit Company, the petitioner above named, and as such President is duly authorized to verify the foregoing petition. That he has read the foregoing petition or had the same read to him and is familiar with the statements contained therein and that the facts stated are true, except as to those facts stated to be upon information and belief and those facts he believes to be true.

(Signed) C. E. UTT.

Subscribed and sworn to before me this 16 day of October, 1926.

(Signed) M. S. LEINBERGER,
Notary Public.

[81] EXHIBIT "A."

Form NP—2.

TREASURY DEPARTMENT,
Washington, D. C.
Office of
Commissioner of Internal
Revenue.

September 1, 1926.

IT:E:SM–60D.
HMW–D–29804.
San Joaquin Fruit Company,
c/o San Joaquin Fruit and Investment Company,
Tustin, California.

Sirs:

An audit of your income and profits tax return for the calendar year 1921 has resulted in the determination of a deficiency in tax of $21,867.40 as shown in Bureau letter dated July 20, 1926.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days

prescribed and an assessment has been made or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Interial Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM–60D–HMW–D–29804.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,

Commissioner.

By ————————————,

Assistant to the Commissioner.

Inclosures:

Form A.

" 882. tel–1.

[82] EXHIBIT "B."

Form NP—1.

TREASURY DEPARTMENT,
Washington, D. C.

Office of
Commissioner of Internal
Revenue.

July 20, 1926.

IT-E-SM.
HMW-D-29804.

San Joaquin Fruit Company,
c/o San Joaquin Fruit and Investment Company,
Tustin, California.

Sirs:

An audit of your income and profits tax return for the year ended December 31, 1921, has resulted in the determination of a deficiency in tax of $21,867.40, as shown the attached statement.

You are granted 30 days from the date of this letter within which to present a protest against the deficiency proposed herein. The protest and any additional statement of facts must be executed in triplicate, under oath, and contain the following information:

(a) The name and address of the taxpayer (in the case of an individual the residence, and in the case of a corporation the principal office or place of business); (b) in the case of a corporation the name of the State of incorporation; (c) the designation by date and symbol of the letter advising of

the proposed deficiency with respect to which the protest is made; (d) the designation of the year or years involved and a statement of the amount of tax in dispute for each year; (3) an itemized schedule of the findings to which the taxpayer takes exception; (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception; and (g) in case the taxpayer desires a hearing, a statement to that effect.

If a protest is filed, any additional evidence or briefs of argument submitted will be given careful consideration, and if the Commissioner finally determines that there is a deficiency, you will be advised thereof by registered mail in accordance with the provisions of Section 274 of the Revenue Act of 1926. Should you not agree to the deficiency as finally determined by the Commissioner, you will be allowed 60 days from the date of mailing of the registered letter (not counting Sunday as the sixtieth day) in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

If you acquiesce in the proposed deficiency as shown in this letter and the accompanying statement, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM HMW–D–29804. In the event that you acquiesce in a part of such deficiency, the waiver should be

executed with respect to the items to which you agree.

Respectfully,
C. R. NASH,
Assistant to the Commissioner.
By ————————.

Inclosures:
Statement.
Form A.
Form 883.

asc–1.

[83] STATEMENT.

IT:E:SM.
HME.–D–29804.

In re: SAN JOAQUIN FRUIT AND INVESTMENT COMPANY,
Tustin, California.

Year.	Deficiency in Tax.
1921.	$21,867.40

You are advised that after careful consideration and review, your application under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of Revenue Act of 1921 has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

1921.			
Profits Tax, Section 328			$19,609.60
Net income as reported by revenue agent		$120,002.33	
Less:			
Interest on U. S. Obligations not exempt	$ 1,085.93		
Profit Tax	19,609.60	20,695.53	
Balance		$99,306.80	
Tax at 10%			9,930.68
Total tax assessable			$29,540.28
Original tax #401704			7,672.88
Deficiency in tax			$21,867.40

A copy of this communication has been forwarded to your authorized representative, McLaren, Goode and Company, San Francisco, California.

Sec–1.

Now, Dec. 18, 1930, the foregoing petition certified from the record as a true copy.

[Seal] ————————————,
Clerk, U. S. Board of Tax Appeals.

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[84] Filed Dec. 27, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 20,801.

SAN JOAQUIN FRUIT AND INVESTMENT CO. (Formerly SAN JOAQUIN FRUIT CO.),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the taxpayer's petition admits and denies as follows:

1. Admits the allegations of paragraph 1.
2. Admits the allegations of paragraph 2.
3. Admits the allegations of paragraph 3.

4. Denies each and every assignment of error contained in paragraph 4.

5 (A). Admits the allegations of the first three sentences of subdivision (A) of paragraph 5.

Admits that the Irvine Company leased certain property to the taxpayer, and calls for the production of said lease at the trial of this cause.

Admits that in accordance with the terms of said lease the taxpayer corporation took possession of the leased property on or about December 1, 1906.

Admits that in its original return for the year 1921 the taxpayer claimed as a part of its invested capital a paid-in surplus of $1,659,372.85, and that the Commissioner of Internal Revenue disallowed said claim.

[85] San Joaquin Fruit and Investment Company, (formerly San Joaquin Fruit Company), Docket No. 20,801.

(B) Admits that in its original return for the year 1921, the taxpayer deducted $69,240.59 under Schedule A–18 as exhaustion, wear and tear. Admits that of said item the Commissioner disallowed the amount of $42,187.62.

(C) Admits that the Commissioner of Internal Revenue refused to consider the value at March 1, 1913, in establishing tree depreciation and denies such March 1, 1913, value claimed by the petitioner.

(D) Admits that the Commissioner of Internal Revenue accorded the taxpayer consideration under the provisions of Sections 327 and 328 of the Revenue Act of 1918 and the Revenue Act of 1921 and computed its profits tax for said year under said provisions.

Denies individually and collectively each and every allegation of fact properly pleaded in the taxpayer's petition not hereinbefore specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

A. R. MARRS,
Special Attorney,
Bureau of Internal Revenue.

ARM:LMG.

Now, Dec. 18, 1930, the foregoing answer certified from the record as a true copy.

[Seal] _____,
Clerk, U. S. Board of Tax Appeals.

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[86] United States Board of Tax Appeals.

DOCKET No. 20,801.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDED PETITION.

The above-named petitioner hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficieney letter (IT:E:-SM–60D–HMW–D29804) dated September 1, 1926, and as the basis of its appeal sets forth the following:

1. The petitioner is a California corporation which was organized on or about July 24, 1922, and which was not in existence during the taxable year 1921.

2. The deficiency letter (copy of which is attached and marked Exhibit "A") was mailed to the San Joaquin Fruit Company, care of the petitioner, on September 1, 1926.

3. The taxes in controversy are not taxes of your petitioner but appear to be income and profits taxes for the calendar year 1921, assessable, if at all, against the San Joaquin Fruit Company, a corporation other than this petitioner, and are more than $10,000.00 to wit: $21,867.40 for the calendar year 1921.

[87] 4. The determination of tax contained in the said deficiency letter is based upon the following errors:

(a) That the petitioner was not in existence during the year in question and hence could not be liable as a taxpayer for any alleged deficiency asserted under the provisions of Section 274 (d), Revenue Act of 1926 against the San Joaquin Fruit Company;

(b) That the San Joaquin Fruit Company was dissolved as a corporation during the year 1922 and its existence was then and there terminated;

(c) That the deficiency letter in question was not issued to this petitioner as a transferee of the assets of the San Joaquin Fruit Company as provided by the Revenue Act of 1926;

(d) That the Commissioner is attempting to exercise judicial power in violation of Section 1 of Article 3 of the Constitution of the United States;

(e) That said Section 280 is without retroactive application to a transfer completed before the effective date of said Section 280;

(f) That upon information and belief petitioner alleges there is no tax liability due from the San Joaquin Fruit Company for the year 1921 for the following reasons:

(1) That the Commissioner failed and refused to permit the San Joaquin Fruit Company to include in its invested capital for the calendar year 1921 the sum of $1,659,372.85, which represents the disallowance of surplus arising from a closed transaction which occurred on November 30, 1916, on which date the San Joaquin Fruit Company exercised an option to acquire certain improved real estate, which option had been acquired on October 13, 1906, and had steadily and continuously increased in value through the ten-year period [88] and on the date of its exercise had a market value of $1,659,372.85.

(2) That the Commissioner has failed and refused to permit the San Joaquin Fruit Company

to deduct depreciation for the year 1921, based on the value of fruit-trees at November 30, 1916, on which date title to the trees was acquired by the San Joaquin Fruit Company by exercise of said option.

(3) That the Commissioner has failed and refused to permit the San Joaquin Fruit Company to deduct depreciation for the year 1921, based on a March 1, 1913, value of fruit-trees included in a leasehold and option owned by the San Joaquin Fruit Company on March 1, 1913, which leasehold and option were converted into fee-simple ownership on November 30, 1916.

(4) That although the Commissioner has determined the San Joaquin Fruit Company's income and profits tax liability for the year 1921, under the provisions of Sections 327 and 328 of the Revenue Act of 1921, the corporations selected by the Commissioner for this purpose under the provisions of Section 328 did not constitute representative corporations engaged in the same line of business.

(g) That upon information and belief petitioner alleges that the statute of limitations has run against the collection of any deficiency in tax for the year in question from the San Joaquin Fruit Company, in that no assessment was made nor any deficiency letter mailed to it within four years after the return was filed by it for the taxable year 1921.

(h) That the statute of limitations has run against the collection of any deficiency in tax for the year in question from the petitioner under the pro-

visions of Section 280 of the Revenue Act of 1926, or any other applicable provision of law, in that no assessment of liability as a transferee of property of the taxpayer, San Joaquin Fruit Company, a corporation, or otherwise or at all, was made or levied within one year after the expiration of the period of [89] limitation for assessment against the said San Joaquin Fruit Company.

(i) That the Commissioner of Internal Revenue was, and is, without jurisdiction of the subject matter of an alleged liability of petitioner, either as an alleged taxpayer or as an alleged transferee of assets, in the premises.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The San Joaquin Fruit Company was organized on or about October 5, 1906. During the period from December 1, 1906, until its dissolution on December 26, 1922, it was engaged in the orchard business. The San Joaquin Fruit and Investment Company, which was incorporated on or about July 24, 1922, acquired the operating properties of the San Joaquin Fruit Company in exchange for stock on or about November 6, 1922, but assumed no liabilities of the San Joaquin Fruit Company at this or any other date.

(b) The San Joaquin Fruit Company filed with the Collector of Internal Revenue for the 6th Collection District of California Federal income and profits tax returns for the calendar year 1921, on, to wit: May 12, 1922. Thereafter, the Commissioner of Internal Revenue caused the books of the

San Joaquin Fruit Company to be examined by an Internal Revenue Agent and as a result of this examination asserted an additional tax liability on the part of the said San Joaquin Fruit Company for the year in question. Thereafter, a series of conferences was held in Washington, D. C., in the offices of the Internal Revenue Bureau followed by the issuance by the Commissioner of a so-called deficiency letter for the year 1921, dated September 1, 1926. Within the period prescribed by law within which to file an appeal, the San Joaquin Fruit and Investment Company filed a petition with the United States Board of Tax Appeals [90] covering the year 1921, in which is set forth certain facts relating to the San Joaquin Fruit Company.

(c) The San Joaquin Fruit Company was engaged in the cultivation and sale of citrus fruits and nuts. During the year 1920, it owned in fee simple 1,000 acres of real estate of which 600 acres were planted to walnut trees and 400 acres to orange trees. The corporation was organized October 5, 1906, with a paid-in capital of $81,000.00. The entire capital stock was issued in equal parts to C. E. Utt, Sherman Stevens and James Irvine. The stock issued to James Irvine was shortly afterwards transferred to the Irvine Company. The Irvine Company (referred to hereinafter as the lessor) leased to the San Joaquin Fruit Company for a term of ten years, beginning December 1, 1906, and ending November 30, 1916, 1,000 acres of land situated in Orange County, California, upon the following terms:

1. The San Joaquin Fruit Company should, at its own expense, set out and plant within four years from the date thereof, all the said land in fruit-trees of various varieties and should properly care for irigating and cultivating the same and replace all trees that died during the ten-year term of the lease.

2. The San Joaquin Fruit Company should also, at its own expense, and during the said term, cultivate crops of grain, beans, peanuts or other products on such portions of land as could be cultivated without material injury to the trees, and prepare such crops for the market at its own expense.

3. A quarter share of said crops including nuts and fruits should be paid to the lessor by the San Joaquin Fruit Company [91] as rental.

4. The San Joaquin Fruit Company should agree to use every reasonable means to prevent the growth and spread of obnoxious weeds, and under certain conditions if such weeds were not checked, the crop rental was increased to one-half the average total amount produced per acre.

5. The San Joaquin Fruit Company should not assign said lease or sublet any portion of the leased premises without the written consent of the lessor.

6. The San Joaquin Fruit Company should, at its own expense, sink wells upon adjacent property owned by the lessor and develop sufficient water for the irrigation of all crops and trees grown upon said land, and construct at its own cost pipe-lines to conduct the water developed thereby to the said leased land, an option to purchase the lands

whereon water had been developed by the San Joaquin Fruit Company being granted by the lessor.

7. Upon satisfaction of all the conditions of the lease the San Joaquin Fruit Company should have the option to purchase any part or all of the leased lands on the last day of the lease at $200.00 per acre, payable ¼ cash on the exercise of the option and the balance in two equal payments within five years after date of purchase, the deferred payments to bear interest at 6 per cent per annum.

8. In the event that the San Joaquin Fruit Company should not exercise its option to purchase said leased lands, then upon the expiration of the term of the lease, the lessor should [92] have the option of purchasing from the San Joaquin Fruit Company its entire water system and the water developed, upon the payment of the actual cost thereof, less depreciation.

9. The lease also provided that at any time after the entire 1,000 acres were set out to trees, and before the expiration of the lease, the San Joaquin Fruit Company might purchase not to exceed ½ of the said leased lands upon the payment to the lessor of $200.00 per acre cash; but if such option were exercised then the option to purchase the balance of the land at the expiration of the lease was terminated.

10. After the expiration of the term of the lease, said option should cease and terminate as to the portion of said lands not purchased thereunder.

11. During the terms of the lease all taxes upon the real estate were payable by the lessor and all

taxes upon the improvements were payable by the San Joaquin Fruit Company.

In accordance with the terms of the above contract the San Joaquin Fruit Company took possession of the leased property on or about November 1, 1906. The land at this time was dry and unirrigated. A portion of it had been previously grown to crops of grain and beans but the remainder was still covered with cactus. Within six months' time the San Joaquin Fruit Company cleared the land, filled in gulches, leveled the property for irrigation and set out 740 acres to trees. Before the end of the first year the irrigating system was so far advanced that water was being delivered to the highest portion [93] of the land. Before the end of the third year the remaining 260 acres of land were planted to orchard trees.

During the ten-year period covered by the lease the entire time of two of the stockholders, Messrs. Utt and Stevens, was devoted to the affairs of the corporation, for which they received no compensation except nominal salaries of $100.00 per month each in the nature of drawing accounts for living expenses.

Before the expiration of the lease the property had been highly improved, including the installation of a complete underground irrigation system, electric lights and electric power, modern houses and rooms, dining-room for employees, maintenance of a large automobile bus for the benefit of school children, postoffice for employees and the employment of a gardener to maintain the appearance of

the property immediately adjacent to the ranch headquarters.

On November 30, 1916, the San Joaquin Fruit Company's option to purchase the property was exercised and the first payment of $75,000.00 provided by the contract was made. The second and final payments of $50,000.00 and $75,000.00 were made on December 31, 1917, and October, 28, 1918, respectively.

On November 30, 1916, the value of the real estate and trees thus acquired by the corporation was $1,854,000.00 as determined by independent appraisal.

In its return for the year 1921 the San Joaquin Fruit Company claimed as a part of its invested capital a paid-in surplus of $1,659,372.85 which represents the difference between the sum of $200,000.00 paid in cash as a portion of the purchase price of the property on November 30, 1916, and the value placed by the corporation on the real estate and trees on that date, which sum has been disallowed.

Upon the exercise of said option, and ever since San Joaquin Fruit Company has had, and is entitled to include in its invested capital, earned [94] surplus and undivided profits amounting to not less than $1,659,372.85 arising from the conversion of capital assets.

(d) In its return for the year 1921 the San Joaquin Fruit Company deducted depreciation of $59,710.96 covering depreciation of its physical properties including trees. This deduction was re-

duced to $58,135.69 by the Revenue Agent, but the Commissioner eliminated the major portion of the depreciation deduction applicable to the San Joaquin Fruit Company's orchard trees and did not give effect to the value of these assets at date of acquisition in establishing the deduction for depreciation. Said value as determined by independent appraisal was $1,100 per acre and the life of the trees was approximately 25 years from November 30, 1916.

(e) The value of the orchard trees leased to the San Joaquin Fruit Company on March 1, 1913, and to which title was acquired by it on November 30, 1916, was $1,115.00 per acre. However, the Income Tax Unit refused to consider the value at March 1, 1913, in establishing tree depreciation for the reason that title to the property was not acquired by the San Joaquin Fruit Company until November 30, 1916. As indicated hereinabove, the San Joaquin Fruit Company owned a property right on March 1, 1913, which was exchanged for a greater property right on November 30, 1916; but the Commissioner has not given effect either to the value of property rights at March 1, 1913, or November 30, 1916, in establishing the depreciation deduction.

(f) The San Joaquin Fruit Company's application for assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1921 was favorably entertained by the Commissioner, who determined that abnormalities of invested capital were present for the year 1921 entitling the San

Joaquin Fruit Company to assessment under these sections. A careful and diligent inquiry discloses [95] the fact that the representative companies whose circumstances were similar to the San Joaquin Fruit Company during the year in question failed to pay the rate of excess profits tax stated by the Commissioner to constitute the fair comparative rate.

All facts stated hereinabove which relate to the San Joaquin Fruit Company are, for the purposes of this petition, stated to be upon information and belief, because the San Joaquin Fruit Company, a dissolved corporation, was the real taxpayer and not the petitioner.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and hold as follows:

(a) That no deficiency in tax on the part of the San Joaquin Fruit and Investment Company as a taxpayer exists for the year in question.

(b) That no deficiency in tax, nor any liability, on the part of the San Joaquin Fruit and Investment Company as a transferee exists for the year in question.

(c) That the Commissioner of Internal Revenue is without jurisdiction as hereinabove alleged.

(d) That assessment of the taxes in controversy against San Joaquin Fruit Company, a corporation, is barred by limitation of time, under Section 277 of the Revenue Act of 1926.

(e) That assessment of any alleged liability against petitioner as a transferee of property of

said taxpayer is barred by limitation of time under Section 280 of the Revenue Act of 1926.

(f) That no tax liability is due from the San Joaquin Fruit Company for the following reasons:

(1) That the San Joaquin Fruit Company is entitled to paid-in [96] surplus in the sum of $1,659,372.85 for the calendar year 1921.

(2) That the San Joaquin Fruit Company is entitled to depreciation for the year 1921 based on the November 30, 1916, value of its orchard trees.

(3) That the San Joaquin Fruit Company is entitled to depreciation for the year 1921 based on the March 1, 1913, value of its leasehold and option.

(4) That the San Joaquin Fruit Company is entitled to additional relief for the year 1921 under the provisions of Sections 327 and 328 of the Revenue Act of 1921.

(g) That judgment of this Board be entered herein in favor of petitioner.

(Signed) N. L. McLAREN, C. P. A.
N. L. McLAREN, C. P. A.
444 California Street,
San Francisco, Calif.,
(Signed) GEORGE M. NAUS.
GEORGE M. NAUS, Attorney,
582 Market Street,
San Francisco, Calif.,
(Signed) DANA LATHAM.
DANA LATHAM, Attorney,
New Title Insurance Bldg.,
Los Angeles, Calif.,
Counsel for Petitioner.

City of Washington,
District of Columbia,—ss.

C. E. Utt, being first duly sworn, deposes and says that he is President of the San Joaquin Fruit & Investment Co., the petitioner above named; that he [97] has read the foregoing petition and the facts set forth are true and correct to the best of his knowledge and belief.

_____.

Subscribed and sworn to before me this —— day of October, 1928.

_____,
Notary Public.

My commission expires ————.

City of Washington,
District of Columbia,—ss.

Dana Latham, being first duly sworn, deposes and says that he is one of the attorneys of record of the San Joaquin Fruit & Investment Company, the petitioner in this case, and has authority to verify the foregoing petition; that he has read the said petition and the facts contained therein he believes to be true upon information furnished him by the taxpayer, which information he believes to be correct.

DANA LATHAM.

Subscribed and sworn to before me this 10th day of October, 1928.

(Sgd.) AMY FAIRLESS,
Notary Public.

My commission expires Sept. 9, 1933.

[98] EXHIBIT "A."

Form NP—2

TREASURY DEPARTMENT,
Washington, D. C.
Office of
Commissioner of Internal
Revenue

September 1, 1926.

IT:E:SM–60D.
HMW–D–29804.
San Joaquin Fruit Company,
c/o San Joaquin Fruit and Investment Company,
Tustin, California.

Sirs:

An audit of your income and profits tax return for the calendar year 1921 has resulted in the determination of a deficiency in tax of $21,867.40 as shown in Bureau letter dated July 20, 1926.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60D-HMW-D-29804. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,

Commissioner.

By ————————————,

Assistant to the Commissioner.

Inclosures:

Form A.

" 882. tel-1.

[99] EXHIBIT "B."

Form NP–1.

TREASURY DEPARTMENT,
Washington, D. C.
Office of
Commissioner of Internal Revenue.

July 20, 1926.

IT–E–SM.
HMW–D–29804.
San Joaquin Fruit Company,
c/o San Joaquin Fruit and Investment Company,
Tustin, California.

Sirs:

An audit of your income and profits tax return for the year ended December 31, 1921 has resulted in the determination of a deficiency in tax of $21,867.40, as shown the attached statement.

You are granted 30 days from the date of this letter within which to present a protest against the deficiency proposed herein. The protest and any additional statement of facts must be executed in triplicate, under oath, and contain the following information:

(a) The name and address of the taxpayer (in the case of an individual the residence, and in the case of a corporation the principal office or place of business); (b) in the case of a corporation the name of the State of incorporation; (c) the designation by date and symbol of the letter advising of the proposed deficiency with respect to which the

protest is made; (d) the designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings to which the taxpayer takes exception; (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception; and (g) in case the taxpayer desires a hearing, a statement to that effect.

If a protest is filed, any additional evidence or briefs of argument submitted will be given careful consideration, and if the Commissioner finally determines that there is a deficiency, you will be advised thereof by registered mail in accordance with the provisions of Section 274 of the Revenue Act of 1926. Should you not agree to the deficiency as finally determined by the Commissioner, you will be allowed 60 days from the date of mailing of the registered letter (not counting Sunday as the sixtieth day) in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

If you acquiesce in the proposed deficiency as shown in this letter and the accompanying statement, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM–HMW–D–29804. In the event that you acquiesce in a part of such deficiency, the waiver should be

executed with respect to the items to which you agree.

Respectfully,
C. R. NASH,
Assistant to the Commissioner.
By ————————.

Inclosures.
Statement.
Form A.
Form 883.
asc–1.

[100] STATEMENT.

IT:E:SM.
HME–D–29804.
In re: SAN JOAQUIN FRUIT AND INVESTMENT COMPANY.
Tustin, California.

Year.	Deficiency in Tax.
1921.	$21,867.40.

You are advised that after careful consideration and review, your application under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of Revenue Act of 1921 has been allowed. Your profits tax is based upon a comparison with the group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above mentioned provisions is as follows:

1921.

Profits Tax. Section 328			$19,609.60
Net income as reported by revenue agent		$120,002.33	
Less:			
Interest on U. S. Obligations not exempt..	$1,085.93		
Profit Tax	19,609.60	20,695.53	
Balance		$99,306.80	
Tax at 10%			9,930.68
Total tax assessable			$29,540.28
Original tax #401704			7,672.88
Deficiency in tax			$21,867.40

A copy of this communication has been forwarded to your authorized representative, McLaren, Goode and Company. San Francisco, California.

Sec.–1.

Now, Dec. 18, 1930, the foregoing "amended petition offered in docket 20801," certified from the record as a true copy.

[Seal] ————————————,
Clerk, U. S. Board of Tax Appeals.

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[101] Filed Mar. 30, 1927. U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET Nos. 6988, 6989 and 20,801.

SAN JOAQUIN FRUIT & INVESTMENT CO. (Successor to SAN JOAQUIN FRUIT CO.),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPLICATION FOR SUBPOENA.

To the United States Board of Tax Appeals:

Application is hereby made for the issuance of a subpoena for the attendance before your Honorable Board at Washington, D. C., of David H. Blair, Commissioner of Internal Revenue, or such person or persons as may be designated by him

from among his subordinates in the Bureau of Internal Revenue, whose oral testimony is desired on behalf of the petitioner in the matter of its tax liability, now pending on appeal.

It is desired that such witness or witnesses shall appear before this Board at its office and place of hearing of causes at the trial of the above-styled cause. It is desired that the said David H. Blair, Commissioner of Internal Revenue, or such person or persons as above described as he may designate to appear as a witness or witnesses herein, shall bring with him or them, for the purpose of exhibiting and testifying from at the hearing referred to above, such documentary evidence now in the possession of the said Commissioner of Internal Revenue with respect to corporations bearing a resemblance to this petitioner and representative corporations whose invested capital has been satisfactorily determined under Section 326 and which are as nearly as may be similarly circumstanced to this petitioner with respect to gross income, net income, profits per unit of business [102] transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances, as will enable this Board to determine the rate of excess profits and/or war profits taxes paid by such corporations and whether or not such corporations are comparable with this petitioner within the meaning of Sections 327 and 328 of the Revenue Act of 1918. Such information is particularly sought from the above specified witness or witnesses for the years covered

by the petitions enumerated above with respect to the following companies:

D. Hewes Realty Corporation,	Orange, California.
Azusa Foothills Citrus Company,	Azusa, California.
The Limoneira Company,	Santa Paula, Calif.
Holmes Realty Company,	Santa Ana, Calif.
The Irvine Company,	Tustin, Calif.

The petitioner now moves this Honorable Board to grant this its application and issue said subpoena, and on this motion it prays the judgment of the Board.

(Signed) N. L. McLAREN,
Certified Public Accountant,
444 California Street,
San Francisco, Calif.,
(Signed) GEO. M. NAUS,
Attorney-at-Law,
Hobart Building,
San Francisco, Calif.,
Counsel for Petitioner.

Now, Dec. 18, 1930, the foregoing application for subpoena, certified from the record as a true copy.

[Seal] ————————————,
Clerk, U. S. Board of Tax Appeals.

[103] United States Board of Tax Appeals.

DOCKET No. 6988.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER CONTINUING PROCEEDING TO RESERVE CALENDAR.

This proceeding came on for hearing at Los Angeles, California, on Tuesday, May 3, 1927, George M. Naus, Esq., and H. L. McLaren, C. P. A., appearing for the petitioner, and John D. Foley, Esq., appearing for the respondent. Evidence was adduced by the petitioner in respect of certain issues in its petition and it appearing that a subpoena had been issued to the Commissioner to produce comparatives and he having declined to so do, upon motion of counsel for the petitioner,—

IT IS ORDERED that the above-entitled pro-,ceeding be and the same hereby is continued to the reserve calendar pending the decision of the courts in Appeal of Oesterlein Machine Company.

JOHN J. MARQUETTE,

Member, United States Board of Tax Appeals.

Dated, Washington, D. C., May 2, 1927.

Now, Dec. 18, 1930, the foregoing order certified from the record as a true copy.

[Seal] ————————————,
Clerk, U. S. Board of Tax Appeals.

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[104] United States Board of Tax Appeals.

DOCKET No. 6989.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER CONTINUING PROCEEDING TO RESERVE CALENDAR.

This proceeding came on for hearing at Los Angeles, California, on Tuesday, May 3, 1927, George M. Naus, Esq., and H. L. McLaren, C. P. A., appearing for the petitioner, and John D. Foley, Esq., appearing for the respondent. Evidence was adduced by the petitioner in respect of certain issues in its petition and it appearing that a subpoena had been issued to the Commissioner to produce comparatives and he having declined to so do, upon motion of counsel for the petitioner,—

IT IS ORDERED, that the above-entitled proceeding be and the same hereby is continued to the

reserve calendar pending the decision of the courts in Appeal of Oesterlein Machine Company.

JOHN J. MARQUETTE,
Member, United States Board of Tax Appeals.

Dated, Washington, D. C., May 2, 1927.

Now, Dec. 18, 1930, the foregoing order certified from the record as a true copy.

[Seal] ——————————,
Clerk, U. S. Board of Tax Appeals.

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[105] United States Board of Tax Appeals.

DOCKET No. 20,801.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER CONTINUING PROCEEDING TO RESERVE CALENDAR.

This proceeding came on for hearing at Los Angeles, California, on Tuesday, May 3, 1927, George M. Naus, Esq., and H. L. McLaren, C. P. A., appearing for the petitioner, and John D. Foley, Esq., appearing for the respondent. Evidence was adduced by the petitioner in respect of certain issues in its petition and it appearing that a subpoena had been issued to the Commissioner to produce comparatives

and he having declined to do so, upon motion of counsel for the petitioner,—

IT IS ORDERED, that the above-entitled proceeding be and the same hereby is continued to the reserve calendar pending the decision of the courts in Appeal of Oesterlein Machine Company.

JOHN J. MARQUETTE,
Member, United States Board of Tax Appeals.

Dated, Washington, D. C., May 2, 1927.

A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, Dec. 18, 1930, the foregoing order certified from the record as a true copy.

[Seal] ——————————,
Clerk, U. S. Board of Tax Appeals.

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[106] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET Nos. 6988, 6989, 20,801.

Promulgated June 29, 1929.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Held, that there is no deficiency for the years prior to the year in which the petitioner was incorporated, where it does not appear that the Commissioner is trying to establish the petitioner's liability as a transferee. Proceeding dismissed, where one other than the taxpayer to whom a deficiency notice was sent brings a proceeding before the Board.

DANA LATHAM, Esq., J. R. SHERROD, Esq., and N. L. McLAREN, C. P. A., for the Petitioner.

JOHN D. FOLEY, Esq., and LLOYD W. CREASON, Esq., for the Respondent.

OPINION.

MURDOCK.—Under date of July 21, 1925, the Commissioner of Internal Revenue sent a deficiency notice to the San Joaquin Fruit & Investment Company of Tustin, California, the petitioner herein, in which he stated:

> The determination of your income tax liability for the years 1918 and 1919 has resulted in a deficiency in tax aggregating $111,281.07, as set forth in Bureau letters dated March 9, 1925, and April 22, 1925.

In a statement attached to this letter this total deficiency was divided into a deficiency of $66,147.93 for 1918 and a deficiency of $45,133,14 for 1919. Within the proper time after receipt of this letter, the petitioner filed its petition with the Board at Docket No. 6988 in which it alleged four errors; one relating to invested capital, two relating to depreciation [107] and one relating to the use of improper comparatives in special assessment. There-

after, the respondent filed his answer and the case came on for hearing in Los Angeles, California, at the conclusion of which hearing, upon the petitioner's motion, the case was continued and placed upon the reserve calendar. Following this, the petitioner moved to amend its original petition in order to allege that the petitioner was not in existence during the taxable years and that inasmuch as the Commissioner is not trying to tax it as a transferee, it is not liable as a taxpayer for any alleged deficiency. This motion was granted, and thereafter the respondent filed his answer to the amended petition and the case came on for further hearing. In the original petition the caption was as follows: "San Joaquin Fruit & Investment Co. (formerly San Joaquin Fruit Co.) Tustin, California." The petition was verified by the president of the San Joaquin Fruit and Investment Company and in the verification it was stated that the San Joaquin Fruit & Investment Company was the successor to the San Joaquin Fruit Company. The verification of the amended petition was substantially the same.

Under date of July 27, 1925, the Commissioner mailed a deficiency notice addressed to San Joaquin Fruit & Investment Company, Tustin, California, the petitioner herein, in which he stated:

> An audit of your income and profits tax return for the year ended December 31, 1920, has resulted in the determination of a deficiency in tax of $22,872.09 as shown in Bureau letter dated June 16, 1925.

Thereafter, in due time, the petitioner filed its petition at Docket No. 6989 in substantially the same form as it filed its petition at Docket No. 6988. The Commissioner answered, the case was heard at the hearing at Los Angeles, California, above mentioned, after which it was continued and placed on the reserve calendar, an amended answer was filed raising [108] the question of the identity of the taxpayer just as in the other case, the respondent answered and the case came on for further hearing.

It appears that in neither of these proceedings is the Commissioner attempting to determine, assess or collect the liability, if any, of the petitioner as a transferee of the property of the San Joaquin Fruit Company, in respect of the tax of that company for the taxable years. Moreover, the alleged taxes in controversy, if they be taxes at all, must be taxes of the San Joaquin Fruit Company which seems to have been in business during the taxable years. The record shows that the San Joaquin Fruit Company was incorporated in October, 1906, under the laws of the State of California for certain purposes for a term of twenty-five years with a capital stock of $100,000 divided into 1,000 shares of the par value of $100 each; on November 6, 1922, at a regular meeting of its Board of Directors they decided to call a meeting of the stockholders on November 18, 1922, for the purpose of considering and acting upon the proposition to dissolve the corporation, wind up its affairs and dispose of its assets according to law; this meeting of the stockholders was duly held on the 18th day of November, 1922, and from the minutes of that meeting it appears that the San Joaquin

Fruit & Investment Company held 807 shares of the stock of the San Joaquin Fruit Company; at this meeting the resolution was adopted to dissolve the corporation, wind up its affairs and distribute its assets according to law; thereafter on the 26th day of December, 1922, a court of competent jurisdiction decreed that the directors of the San Joaquin [109] Fruit Company be made trustees for the dissolution of its assets and the winding up of its affairs and ordered them to distribute the real and personal property to the San Joaquin Fruit & Investment Company and further ordered, adjudged and decreed that the San Joaquin Fruit Company was thereby dissolved; the last paragraph of the decree was as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the respective interests of the stockholders of said San Joaquin Fruit Company, have hereinbefore been fixed, namely, there were four stockholders as herein named, three of whom have assigned their whole interest herein unto the said San Joaquin Fruit and Investment Company, and that now the San Joaquin Fruit and Investment Company is the only stockholder, and the only person to whom said property and assets of said San Joaquin Fruit Company shall be distributed and conveyed.

The record further shows that thereafter a copy of the decree was filed in the office of the Department of State of the State of California; the San Joaquin Fruit Company on June 19, 1919, filed

its income and profits tax return for the year 1918, on March 15, 1920, filed its return for 1919, on March 15, 1921, filed its return for 1920 and on May 12, 1922, filed its return for 1921; the San Joaquin Fruit & Investment Company was incorporated in July, 1922, under the laws of the State of California, for a period of fifty years with a capitalization of $1,500,000 divided into 15,000 shares of the par value of $100 each, for certain purposes set forth in its articles of incorporation, which purposes were similar to, but broader and not the same as the purposes set forth in the articles of incorporation of the San Joaquin Fruit Company; under date of December 29, 1927, the Commissioner sent a notice of liability under section 280 of the Revenue Act of 1926, to the San Joaquin Fruit & Investment Company as a transferee of the San Joaquin Fruit Company liable for additional taxes of the latter company for the year 1921, [110] following the receipt of which the San Joaquin Fruit & Investment Company filed a petition with this Board at Docket No. 35,835, which proceeding has not been consolidated with the present proceedings and is not being decided in the present proceedings.

After carefully considering the facts before us we are satisfied that the petitioner has made out a *prima facie* case, which has not been overcome by the respondent, which *prima facie* case shows that the petitioner was not in existence during the taxable years and that the tax liability which the Commissioner is trying to establish against the petitioner is not its tax liability. Therefore, for the

years 1918, 1919 and 1920 an order of no deficiency will be entered.

The situation in regard to the year 1921 is somewhat different. For that year, under date of September 1, 1926, the Commissioner sent a deficiency notice addressed to the "San Joaquin Fruit Company c/o San Joaquin Fruit and Investment Company, Tustin, California," in which he stated:

> An audit of your income and profits tax return for the calendar year 1921 has resulted in the determination of a deficiency in tax of $21,-867.40 as shown in Bureau letter dated July 20, 1926.

The letter of July 20, 1926, was addressed in the same way. On October 25, 1926, at Docket No. 20,-801 a petition was filed under the title of "San Joaquin Fruit & Investment Company (formerly San Joaquin Fruit Company)." The petition was verified by the president of the San Joaquin Fruit & Investment Company, which verification stated that the San Joaquin Fruit & Investment Company was the successor to the San Joaquin Fruit Company. Errors were set forth in this petition which were similar to [111] the errors set forth in the above-mentioned two petitions. The respondent filed his answer. The hearing at Los Angeles, California, covered this case also, at the conclusion of which hearing this case was continued and placed on the reserve calendar and came on for further hearing with the other three cases, all three of which cases were consolidated for hearing and decision by an order of the Board. At the last hearing the

petitioner moved to amend its petition in this case as he had theretofore done in the other two cases and for the same purposes. On this motion, which was objected to by counsel for the respondent, we have taken no action.

Upon consideration of the circumstances in connection with this proceeding at Docket No. 20,801, we are of the opinion that the deficiency notice in question was sent to the San Joaquin Fruit Company in connection with its tax liability for the year 1921 and that the deficiency notice was not a notice to the San Joaquin Fruit & Investment Company corporation, which filed the petition herein and was not a notice of the determination of its tax liability for any year, and that neither the San Joaquin Fruit & Investment Company, its President, who verified the petition, nor counsel who prepared and signed the petition, had proper authority or purported to act for the San Joaquin Fruit Company. The petitioner herein not being the taxpayer within the meaning of the Section of the Revenue Act giving the Board jurisdiction to hear and decide proceedings, we have no jurisdiction in this proceeding and therefore dismiss the same. Bisso Ferry Company, 8 B. T. A. 1104; Bond, Inc., 12 B. T. A. 339; American Arch Company, 13 B. T. A. 552; Weis & [112] Lesh Manufacturing Company, 13 B. T. A. 144; Sanborn Brothers, 14 B. T. A., 1059; Carnation Milk Products Co., 15 B. T. A., 556.

For the years 1918, 1919 and 1920 judgment will be entered for the petitioner. The proceeding in

so far as it relates to the year 1921 is dismissed for lack of jurisdiction.

Now, Dec. 18, 1930, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal] _____,
Clerk, U. S. Board of Tax Appeals.

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[113] United States Board of Tax Appeals,
Washington.

DOCKET Nos. 6988, 6989, 20,801.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the Board's findings of fact and opinion, promulgated June 29, 1929,—

IT IS ORDERED AND DECIDED: That there are no deficiencies for the years 1918, 1919, and 1920. And it is further

ORDERED AND DECIDED: That the proceeding in so far as it relates to the year 1921 is dismissed for lack of jurisdiction.

Entered Jun. 29, 1929.

A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.
(Signed) BENJAMIN H. LITTLETON,
Member, United States Board of Tax Appeals.

Now, Dec. 18, 1930, the foregoing decision certified from the record as a true copy.

[Seal] ————————————,
Clerk, U. S. Board of Tax Appeals.

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[114] Filed Dec. 19, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOC. Nos. 6988, 6989, 20,801.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION TO VACATE BOARD'S DECISION.

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and moves the Board that an order be entered vacating the decision of the Board entered on June 29, 1929, whereby it was ordered and decided that there are no deficiencies for the years 1918, 1919 and 1920 and that

the proceeding in so far as it relates to the year 1921, is dismissed for lack of jurisdiction and for the entry of an order ordering and deciding that there are deficiencies against the above-named petitioner in the amounts stated in the deficiency letters dated July 21, 1925, July 27, 1925, and September 1, 1926.

(Sgd.) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

Denied Dec. 19, 1929.

(Signed) J. E. MURDOCK,
Member.

Now, Dec. 18, 1930, the foregoing motion and order entered thereon certified from the record as a true copy.

[Seal] _____,
Clerk, U. S. Board of Tax Appeals.

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[115] Filed Dec. 21, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOC. Nos. 6988, 6989, 20,801.

ROBERT H. LUCAS, Commissioner of Internal Revenue,

Petitioner on Review,

vs.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,

Respondent on Review.

PETITION FOR REVIEW TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Robert H. Lucas, Commissioner of Internal Revenue, by his attorneys, G. A. Youngquist, Assistant Attorney General, C. M. Charest, General Counsel, Bureau of Internal Revenue, and P. S. Crewe, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

The petitioner on review is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The respondent on review is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office and place of

business in the city of Tustin, California. The San Joaquin Fruit Company, hereinafter referred to, was a corporation organized under the laws of the State of California, and had its principal office and place of business in the city of Tustin, California. The income and profits tax returns of the San Joaquin Fruit Company for the years 1918, 1919, 1920 and 1921 [116] were filed with the Collector of Internal Revenue for the Sixth District of California.

II.

The petitioner determined a deficiency in income taxes for the years 1918 and 1919 of $111,281.07 and on July 21, 1925, in accordance with the provisions of Section 274 of the Revenue Act of 1924, sent to the respondent by registered mail a notice of said deficiency. The petitioner determined a deficiency in income and profits taxes for the calendar year 1920 of $22,872.09 and on July 27, 1925, in accordance with the provisions of Section 274 of the Revenue Act of 1924, sent to the respondent by registered mail a notice of said deficiency. The petitioner determined a deficiency in income and profits taxes for the calendar year 1921 of $21,867.40 and on September 1, 1926, in accordance with the provisions of Section 274 of the Revenue Act of 1926, sent a notice of said deficiency by registered mail addressed to the San Joaquin Fruit Company, c/o San Joaquin Fruit & Investment Company, Tustin, California. After the sending of the deficiency notice dated July 21, 1925, with respect to the years 1918 and 1919, the respondent filed its petition with

the United States Board of Tax Appeals at Docket No. 6988 and after the sending of the deficiency notice of July 27, 1925, the respondent filed with the U. S. Board of Tax Appeals its petition at Docket No. 6989. After the sending of the deficiency notice dated September 1, 1926, the respondent filed with the United States Board of Tax Appeals a petition at Docket No. 20,801 under the title "San Joaquin Fruit & Investment Company (formerly San Joaquin Fruit Company)." Under date of August 15, 1928, the United [117] States Board of Tax Appeals entered an order consolidating the proceedings under the petitions filed by the respondent at Docket Numbers 6988, 6989 and 20,801 for hearing and on October 16, 1928, a hearing was had before the United States Board of Tax Appeals. On June 29, 1929, the United States Board of Tax Appeals promulgated its opinion in said appeals under said petitions and on the same date entered its decision whereby it was ordered and decided that there were no deficiencies for the years 1918, 1919 and 1920 and that the proceeding in so far as it relates to the year 1921 was dismissed for lack of jurisdiction. On December 19, 1929, the petitioner filed with the United States Board of Tax Appeals his motion moving the Board for the entry of an order vacating its decision of June 29, 1929, and for an order deciding and ordering that there were deficiencies for the years 1918, 1919, 1920 and 1921 against the respondent herein in the amount stated in the deficiency letters above re-

ferred to; that on the same day said motion was denied by the United States Board of Tax Appeals.

III.

The petitioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order rendered and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the petitioner, and the petitioner assigns the following errors, and each of them, which, he avers, occurred in the said record, proceedings, decision and final order so rendered and entered by the Board of Tax Appeals, to wit:

1. The Board of Tax Appeals erred as a matter of law in ordering and deciding that there were no deficiencies for the years 1918, 1919 [118] and 1920.

2. The Board of Tax Appeals erred in not ordering and deciding that there were deficiencies for the years 1918, 1919, 1920 and 1921 in the amounts stated in the deficiency letters above referred to.

3. The Board of Tax Appeals erred as a matter of law in ordering and deciding that the proceeding in so far as it relates to the year 1921 be dismissed for lack of jurisdiction.

4. The Board of Tax Appeals erred as a matter of law in denying petitioner's motion to vacate its order of June 29, 1929.

5. The Board of Tax Appeals erred as a matter of law in failing to grant the petitioner's motion moving that the Board enter its order ordering

and deciding that there were deficiencies against the respondent herein in the amounts found in the deficiency letters of the Commissioner for the years 1918, 1919, 1920 and 1921.

6. The Board of Tax Appeals committed other plain errors manifest in the record.

IV.

WHEREFORE, the Commissioner of Internal Revenue petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit and that a transcript of the record be prepared in accordance with law and with the [119] rules of said Court and transmitted to the Clerk of said Court for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) G. A. YOUNGQUIST.
G. A. YOUNGQUIST,
Assistant Attorney General.
(Sgd.) C. M. CHAREST.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.
(Sgd.) P. S. CREWE.
P. S. CREWE,
Special Attorney,
Bureau of Internal Revenue.

[120] United States of America,
District of Columbia,—ss.

P. S. Crewe, being duly sworn, says that he is a Special Attorney for the Bureau of Internal Revenue and as such is duly authorized to verify the above and foregoing petition for review to the United States Circuit Court of Appeals for the Ninth Circuit; that he has read said petition for review and is familiar with the statements therein contained and that the facts therein stated are true, except such facts as may be stated on information and belief and those facts he believes to be true.

(Sgd.) P. S. CREWE.

Sworn and subscribed to before me this 21st day of December, 1929.

[Seal] (Sgd.) GEORGE W. KREIS,
Notary Public.

My commission expires Nov. 12, 1932.

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[121] Filed Dec. 26, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOC. Nos. 6988, 6989, 20,801.

ROBERT H. LUCAS, Commissioner of Internal Revenue,

Petitioner on Review,

vs.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,

Respondent on Review.

NOTICE OF FILING PETITION FOR REVIEW.

To J. R. Sherrod, Esq., 922 Southern Building, Washington, D. C., Attorney for Respondent on Review.

Notice is hereby given to you that the Commissioner of Internal Revenue, petitioner on review in the above-entitled proceeding, did on the 21st day of December, 1929, file with the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision rendered by the said Board of Tax Appeals in said proceeding, a copy of which said petition for review, as filed, is herewith served upon you.

(Sgd.) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Service of the foregoing notice and of a copy of the petition for review mentioned in said notice is acknowledged this 23 day of December, 1929.

(Sgd.) J. ROBERT SHERROD,
Attorney for Respondent on Review.

Now, Dec. 18, 1930, the foregoing petition for review and notice of filing certified from the record as a true copy.

[Seal] _____,
Clerk, U. S. Board of Tax Appeals.

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[122] Lodged. Oct. 11, 1930.

Filed Nov. 21, 1930. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET Nos. 6988, 6989, 20,801.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,
Petitioner (Respondent on Review),
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent (Petitioner on Review).

STATEMENT OF EVIDENCE.

The above cause came on for hearing at Los Angeles, California, before the Hon. John J. Marquette, Member, United States Board of Tax Appeals, upon the 3d of May, 1927, there being present the petitioner by its attorneys, N. L. McLaren

and George M. Naus, and respondent by his attorney, John D. Foley. The three cases bearing docket numbers set forth above were consolidated for purposes of hearing and decision.

Thereupon Mr. Naus announced that he was "ready for the taxpayer" and he proceeded to outline petitioner's case. He stated that the first error alleged in the petition related to the determination of "our" invested capital; that the second error related to depreciation; that the third error would be abandoned; and that the fourth error alleged the use of improper comparatives in special assessment. He stated that it was petitioner's desire at that time, to ask "that the evidence be taken with respect to the issues other than the special assessment feature, leaving that open on that matter." Respondent objected to trying the case piecemeal. Petitioner stated that it had previously asked to have the cause placed on the appeal calendar, that it had brought its witnesses from the country, and that it wanted to have the evidence go in. The Board then ruled that the hearing should proceed.

[123] Thereupon, on motion of petitioner, there was received in evidence as Petitioner's Exhibit No. 1, letter dated February 3, 1926, addressed to the San Joaquin Fruit Company and signed by C. R. Nash, Assistant to the Commissioner, by F. R. Clute. There was also received in evidence, as Petitioner's Exhibit No. 2, letter dated November 2, 1922, addressed to the San Joaquin Fruit Company by E. H. Batson, Deputy Commissioner.

Thereupon the following testimony was heard:

TESTIMONY OF C. E. UTT, FOR PETITIONER.

C. E. UTT, having been first duly sworn as a witness on behalf of petitioner, testified as follows:

My name is C. E. Utt, and my residence is Tustin, California. I have been connected with the taxpayer corporation from the beginning of 1906. I helped to organize it and have been president and general manager continuously from the beginning. The paid-in capital was $81,000 one-third of which was mine. James Irvine, Sherman Stevens and I put in the whole $81,000. We were all three directors; I was president, Sherman Stevens was secretary, and I think Mr. Irvine vice-president.

Thereupon the witness gave certain testimony relative to the taxpayer's invested capital. The Board made no finding on the basis of said testimony and no conclusions relative to the issue for which it was offered; it is not relevant or material to the issues of this appeal.

[124] TESTIMONY OF JAMES IRVINE, FOR PETITIONER.

JAMES IRVINE, having been first duly sworn as a witness for petitioner, gave certain testimony relative to the taxpayer's invested capital and depreciation. The Board made no findings with respect to said testimony and no conclusions with respect to the issues on which it was offered; it is immaterial to the issues presented on this appeal.

(Testimony of C. E. Utt.)

Thereupon petitioner announced that it closed its case with the exception of the special assessment issue. As to that issue, it requested that the case be continued pending the response of the Commissioner to a subpoena which it had issued.

TESTIMONY OF C. E. UTT, FOR RESPONDENT (RECALLED).

C. E. UTT, having been recalled as a witness on behalf of respondent, offered certain testimony relative to the income tax return of the taxpayer corporation for the year 1916. The Board made no findings relative to said testimony and no conclusions regarding it. It is irrelevant and immaterial to the issues of this appeal.

Thereupon each of the three cases, Docket Nos. 6988, 6989 and 20,801 were continued to the reserve calendar pending the decision of the Supreme Court in the Oesterline Machine Company case with the agreement that, upon motion of either side, they might be taken from the reserve calendar.

[125] The above cause again came on for hearing on the 16th day of October, 1928, before the Hon. J. Edgar Murdock, Member, United States Board of Tax Appeals, there being present the petitioner by its attorneys, Dana Latham, J. R. Sherrod and N. L. McLaren; and respondent by his attorneys, John D. Foley and Lloyd W. Creason.

Thereupon counsel for petitioner announced that an amended petition had been filed in Docket No.

20,801 but that a copy of said petition had not been served upon respondent, and that he had had no opportunity to answer. Counsel for respondent announced that in the absence of service of the petition upon him he did not desire to file any answer to the amended petition, but that he desired to contest petitioner's right to file the same. He also objected to the amended petitions filed by petitioner in Docket Nos. 6988 and 6989. As grounds for his objection to the amended petitions in said three cases he stated that petitioner was estopped to make the amendments; that deficiency letters had been mailed, advising the taxpayer of its opportunity to appeal and that appeals had been taken; that more than a year prior to the present date the petitioner had gone to trial upon the merits of its appeals without any change being made in the names of the parties; that on petitioner's motion a continuance of the hearing had been ordered for the sole purpose of awaiting a certain decision of the United States Supreme Court; that petitioner had described itself in the petition upon which the hearing was had as "San Joaquin Fruit and Investment Company, formerly San Joaquin Fruit Company"; and that having contested the merits of the case on the theory that it was the taxpayer, it was not in a position to assert, at the present hearing, that it was no the taxpayer.

[126] Thereupon the Board member announced that respondent's objection to the amended petitions in Docket Nos. 6988 and 6989 was untimely; and

(Testimony of C. E. Utt.)

that petitioner's motion to amend its petition in Docket No. 20,801 and respondent's objection to said motion would be taken under advisement by him. He stated that he would receive evidence relative to the motion, and that if he should subsequently allow the amendment, respondent should have an exception to his ruling. It was understood that the evidence to be given should apply to all three of the consolidated cases.

Thereupon the following testimony was heard:

TESTIMONY OF C. E. UTT, FOR PETITIONER (RECALLED).

C. E. UTT, having been first duly sworn as a witness on behalf of petitioner, testified as follows:

Direct Examination.

My name is C. E. Utt, and my residence is Tustin, California. My occupation is farmer, president of the San Joaquin Fruit and Investment Company. I am quite familiar with the San Joaquin Fruit Company. I was president of the company from the time it was organized in 1906 until its dissolution in 1922.

Thereupon the witness identified a document presented to him as the Articles of Incorporation of the San Joaquin Fruit Company, filed with the Secretary of State, Secramento, California. A certified copy of those Articles was received in evidence as Petitioner's Exhibit No. 1. A true and correct copy of the same is hereto attached.

(Testimony of C. E. Utt.)

Thereupon the witness identified a certain book as the minute-book of the San Joaquin Fruit Company and the same was offered in evidence as Petitioner's Exhibit No. 2. Respondent objected to the entire book being received without the pertinent portions being designated, but the objection [127] was overruled and the book was received in evidence. An exception for respondent was noted.

Thereupon the witness identified a certain document as a copy of the minutes of the Board of Directors of the San Joaquin Fruit Company held on November 6, 1922, which minutes he stated were the same as those appearing on pages 32 and 33 of the minute-book previously introduced in evidence. The same was offered in evidence as Petitioner's Exhibit No. 3. Respondent objected on the ground that the San Joaquin Fruit and Investment Company was estopped to raise the question of whether it was the taxpayer to whom the deficiency letter had been sent and hence that the minutes offered in evidence were immaterial. The objection was overruled, the document was received in evidence, and the exception for respondent was noted.

Thereupon the witness identified a certain document as a copy of the minutes of a special meeting of the stockholders of the San Joaquin Fruit Company held on November 18, 1922, which was a copy of the minutes appearing on page 36 of the minute-book. The same was offered in evidence as Petitioner's Exhibit No. 4. Respondent objected on the ground that it was irrelevant and immaterial

(Testimony of C. E. Utt.)

and that petitioner was estopped from raising the question as to whether or not it was the taxpayer in the case. The objection was overruled, the document was received in evidence, and an exception for respondent was noted.

Thereupon the witness identified a certain judgment and decree of dissolution entered by the Superior Court of the County of Orange, State of California, dated December 26, 1922. Petitioner offered the same in evidence as Petitioner's Exhibit No. 5. Respondent objected on the ground that it was irrelevant and immaterial and on the further ground that the San Joaquin Fruit and Investment Company was estopped to assert that the San Joaquin [128] Fruit Company was dissolved. The objection was overruled, the document was received in evidence and an exception for respondent was noted.

Thereupon the witness testified that the San Joaquin Fruit Company had transacted no business after December 26, 1922, the date of the judgment and decree of dissolution. The parties stipulated that the income tax return for the year 1918 had been filed on June 10, 1919; that the return for the year 1919 was filed on March 15, 1920; that the return for the year 1920 had been filed on March 15, 1921; that the return for the year 1921 had been filed on May 12, 1922; and that all these returns were filed in the name of San Joaquin Fruit Company.

Thereupon the following colloquy was had:

(Testimony of C. E. Utt.)

Mr. FOLEY.—Are you raising any question as to the statute of limitations, Mr. Latham?

Mr. LATHAM.—We do not feel that in this case the statute of limitations is involved, but that is for the Board to decide on the evidence.

Mr. FOLEY.—Then, if the Board please, at the conclusion of this testimony, I want to offer the waivers in evidence.

The MEMBER.—That may be done. That is, you may have an opportunity to offer them at that time.

Thereupon petitioner offered in evidence as Petitioner's Exhibit No. 6 a certificate by the Secretary of the State of California, showing that a copy of the decree of the Superior Court of the State of California in and for the County of Orange, dissolving the San Joaquin Fruit Company, a corporation, was filed in the office of the Secretary of State on the 29th day of September, 1922. Respondent objected on the ground that the certificate was irrelevant and immaterial and that the San Joaquin Fruit and Investment Company was estopped to assert that the San Joaquin Fruit Company was a different corporation or that it had been dissolved. The objection was overruled, the instrument was received in evidence and an exception was noted for respondent.

[129] Thereupon the witness identified a certain document as the Articles of Incorporation of the San Joaquin Fruit and Investment Company, organized on the 12th day of July, 1922, filed in the

(Testimony of C. E. Utt.)

office of the Secretary of State July 4, 1922. Petitioner offered the same in evidence as Petitioner's Exhibit No. 7. Respondent objected on the ground that it was irrelevant and immaterial, and that the San Joaquin Fruit and Investment Company was estopped to assert that it was a different corporation from the San Joaquin Fruit Company; and that it was organized any time later than the year 1926. The objection was overruled; the paper was admitted in evidence; and an exception for respondent was noted.

Thereupon petitioner offered in evidence as Petitioner's Exhibit No. 8, Articles of Incorporation of the San Joaquin Fruit and Investment Company, duly certified to by the clerk of court, or County Clerk of Orange County. Respondent objected on the same ground used with respect to Exhibit No. 7. The objection was overruled, the document was received in evidence, and an exception for respondent was noted.

Thereupon petitioner offered in evidence as Petitioner's Exhibits No. 9 and No. 10, letters addressed by the Commissioner of Internal Revenue to the San Joaquin Fruit and Investment Company under the respective dates of July 21, 1925, and July 27, 1925. These were objected to by respondent on the ground that they were incompetent and immaterial, and that petitioner was estopped to deny that the San Joaquin Fruit and Investment Company and the San Joaquin Fruit Company are one and the same corporation. The objection was overruled,

the letters were admitted in evidence and an exception for respondent was noted.

[130] Thereupon petitioner offered in evidence as Petitioner's Exhibit No. 11, a letter from the Commissioner of Internal Revenue addressed to the San Joaquin Fruit Company, c/o San Joaquin Fruit and Investment Company, dated September 1, 1926. This was objected to by respondent for the same reason noted above, but the objection was overruled, the letter was received in evidence and an exception for respondent noted.

Thereupon petitioner offered in evidence as Petitioner's Exhibit No. 12 a letter addressed to the Commissioner of Internal Revenue to San Joaquin Fruit and Investment Company dated December 29, 1927. This was objected to by respondent for the reasons stated above, but the objection was overruled, the letter was admitted in evidence and an exception for respondent noted.

Thereupon it was stipulated by the parties, subject to the objections which counsel for respondent had already made with relation to the irrelevancy and materiality of all this previous evidence, that the revenue agent's report covering the tax liability of the San Joaquin Fruit Company was completed November 14, 1921, and delivered to the taxpayer at that time. The objection was overruled and an exception was noted. It was also stipulated, subject to the same objection by respondent, that the revenue agent's report showing the tax liability of the San Joaquin Fruit Company covering the year 1921

was addressed to the San Joaquin Fruit Company and was dated October 10, 1925.

Thereupon petitioner offered in evidence as Petitioner's Exhibits No. 13 and No. 14, letters addressed by Deputy Commissioner Bright to the San Joaquin Fruit and Investment Company under the respective dates of August 8, 1924, and March 9, 1925. Respondent objected on the ground that the letters were [131] irrelevant and immaterial and that the San Joaquin Fruit and Investment Company was estopped to deny that it was a different corporation from the San Joaquin Fruit Company. The objection was overruled, the letters were received in evidence and an exception for respondent was noted.

Thereupon petitioner offered in evidence as Petitioner's Exhibit No. 15, a letter addressed by Deputy Commissioner Bright to the San Joaquin Fruit Company dated April 22, 1925. Respondent objected on the grounds previously stated, but the objection was overruled, the letter was received in evidence, and an exception was noted.

Thereupon petitioner offered in evidence as Petitioner's Exhibit No. 16, a letter signed by Deputy Commissioner Bright addressed to the San Joaquin Fruit and Investment Company, dated June 16, 1925. Respondent objected on the grounds which he had previously stated, but the objection was overruled, the letter was received in evidence and an exception for respondent was noted.

Thereupon petitioner offered in evidence as Petitioner's Exhibit No. 17 a letter addressed by Assistant Commissioner Nash to the San Joaquin Fruit Company, c/o of the San Joaquin Fruit and Investment Company, dated July 20, 1926. Respondent objected on the same grounds which he had stated above, the objection was overruled, the letter received in evidence and an exception for respondent was noted.

Thereupon the following colloquy was had:

The MEMBER.—Is it admitted on the part of the petitioner that the first time the petitioner or the San Joaquin Fruit and Investment Company ever contended to the Commissioner or any of his representatives that the two companies were separate companies is when these amended petitions were filed?

[132] Mr. LATHAM.—If your Honor please, prior to that time the taxpayer had never been considering the matter of collection. The tax had been contested on its merits, but there had been no consideration one way or another as to how the tax was to be collected.

The MEMBER.—I would understand you then to admit that the San Joaquin Fruit and Investment Company was in communication with the Commissioner in regard to these various taxable years, but did not advance a contention it was a different company until these amended petitions were filed?

Mr. LATHAM.—The matter had never been raised.

(Testimony of C. E. Utt.)

The MEMBER.—This is the first time it was ever raised?

Mr. LATHAM.—Yes, sir. Some of the letters came out addressed to the Fruit Company and some to the San Joaquin Fruit and Investment Company.

Thereupon the witness, C. E. Utt, testified that he, as president of the San Joaquin Fruit and Investment Company, had filed petitions with the United States Board of Tax Appeals for redetermination of the deficiencies asserted in letters designated as Petitioner's Exhibits Nos. 9, 10, 11 and 12. He stated that the letter designated Exhibit No. 12 had come to the Company in the regular mail, was taken from its files and referred to its attorneys.

Thereupon petitioner moved the Board for a petition to amend its pleadings in Docket Nos. 6988 and 6989 and 20,801, to conform to the proof adduced. It also moved for a judgment of no deficiency as far as petitions Nos. 6988 and 6989 were concerned. So far as Docket No. 20,801 was concerned, it removed its motion for leave to file an amended petition. Attorneys for respondent moved that the deficiencies proposed for assessment by the Commissioner of Internal Revenue be approved.

[133] Thereupon the following colloquy was had:

The MEMBER.—Is there any further testimony?

Mr. LATHAM.—I have no further testimony.

The MEMBER.—Very well. Then, so far as this witness is concerned, he may be excused.

Mr. FOLEY.—That depends upon whether the pleadings stand as they are now. If there are no

further amendments I would have no further need of the witness, but if they do make amendments to raise, for instance, the question of the statute of limitations, then I will want Mr. Utt as a witness.

Mr. LATHAM.—If your Honor please, we do not want it understood by counsel for the respondent that we are waiving the statute of limitations. If the record should show on the pleadings as they now stand, on the evidence adduced that the statute of limitations is barred naturally we expect to raise it.

The MEMBER.—Have you raised any issue of the statute of limitations in your pleadings so far?

Mr. LATHAM.—I think I can state in a nutshell the petitioner's position.

The MEMBER.—If you want to conform your pleadings to the proof or except to raise any new issues than the issues that are otherwise raised by the pleadings, it seems to me it is up to you to state what they are.

Mr. LATHAM.—We have at this time, if your Honor please, no substantive amendments to offer, except, of course, the amendment which has already been offered as far as docket 20,801 is concerned, upon which your Honor has not ruled, and our proof in this case will conform to the amended petition in case your Honor permits it to be filed.

[134] The MEMBER.—It seems to me it would be interesting to know in this case why the San Joaquin Fruit and Investment Company was at all active in the matter in these proceedings, why, in

the first place it did not state it was not the taxpayer and why if that is true and it was not the same corporation why it was brought in at all. Here apparently these proceedings have gone on for some time between the Commissioner on the one hand and the San Joaquin Fruit and Investment Company on the other. Why that was we have not been informed. There must have been some reason for it. It seems to me it would be interesting to know why, to know why they concerned themselves about the matter at all, from one side or the other. If the parties are not interested in it I am not interested in it either.

Mr. LATHAM.—I do not know how to explain it, frankly. We have not been in the case from the beginning. I have before me a record of all of the correspondence which has taken place between the Bureau and the taxpayer.

The MEMBER.—You filed the petitions, didn't you?

Mr. LATHAM.—I have been in the case since the amended petitions were filed. I had nothing to do with the original petitions in any one of the appeals herein involved.

* * * * * * * * * *

The MEMBER.—I have not studied the matter out as to whose burden it is to clear up the situation. It would appear puzzling to me if the two corporations did not have anything to do with each other, why one corporation would concern itself with the other corporation's troubles. Apparently that has been done. Why that has been done might prove

(Testimony of M. L. McLaren.)

interesting here. If you want to rely upon the evidence as it is already introduced, it is all right.

Mr. LATHAM.—I would like to call Mr. McLaren on that point.

Whereupon M. L. McLAREN, called as a witness on behalf of petitioner, testified as follows:

TESTIMONY OF M. L. McLAREN, FOR PETITIONER.

Direct Examination.

My name is M. L. McLaren and I reside in San Francisco. I am a Certified Public Accountant practicing in San Francisco. I have been [135] familiar with the tax matters of the San Joaquin Fruit and Investment Company and the San Joaquin Fruit Company since the early part of 1923, and I filed the original petitions in Docket Nos. 6988 and 6989. I had contact with the case while it was pending in the Bureau of Internal Revenue and I know that prior to the receipt of the 60-day letters dated July 21, 1925, Bureau communications had been addressed to the San Joaquin Fruit and Investment Company. I saw letters which had been so addressed. The 60-day letter, to the best of my recollection, was addressed to the San Joaquin Fruit and Investment Company in Docket Nos. 6988, 6989. I had occasion to consider and did consider, that the letter was not addressed to the San Joaquin Fruit Company.

(Testimony of M. L. McLaren.)

Q. Why did you file the appeal in the manner in which you did?

A. The taxpayer was the San Joaquin Fruit Company, and the San Joaquin Fruit and Investment Company was not in existence during the years 1918, 1919, 1920 and 1921. The sixty-day letter was addressed to the San Joaquin Fruit and Investment Company. The obvious thing to do would have been to file the petition in the name of the San Joaquin Fruit and Investment Company because under the law and the rules of the Board of Tax Appeals, the petition had to be so filed, and because of the fact that there had been a change in name, that the San Joaquin Fruit and Investment Company was not the actual taxpayer at all, the logical thing to put the Board on notice and to put the Commissioner on notice seemed to be to prepare the petition in the way in which we filed it, that is, make it out with the name San Joaquin Fruit and Investment Company and then put in brackets, "formerly the San Joaquin Fruit Company."

Q. Now, Mr. McLaren, you said a change of name. What did you have in mind when you did that generally, in the way in which you have described?

A. Perhaps I ought to explain further on that point. I did not mean to imply a change in name only, because it was not a change in name only. The old company was dissolved, and all of its assets were distributed and a new company was formed with different capitalization which acquired the the assets of the old company.

(Testimony of M. L. McLaren.)

[136] Q. Now, Mr. McLaren, I ask you when you filed that petition and did not specifically state that the San Joaquin Fruit Company was no longer in existence, was there any idea of deceiving or misleading the Bureau of Internal Revenue, or any official or member of the Board of Tax Appeals?

A. On the contrary the only reason the explanatory matter was put on the petition was so that neither the Commissioner or the Board would be misled. That was the only reason for so doing. I may add in that connection that the question of names of taxpayers and technicalities of that sort was not in the minds of officials of the company nor myself, and when I say in the minds of the officials of the company I mean in any conversations I had with them we were concerned solely with the principle of law involved and not regarding technicalities of that description, back in 1925.

Q. You raised the other issues at that time which you hoped would wipe out all of the tax, is that correct? A. That is it exactly.

The first time it was called to my attention that the letter in Docket No. 6988 was addressed to a taxpayer not in existence during the year for which the tax liability was asserted was during the latter part of 1927. I received the letter from Mr. Utt or Mr. Utt's office, enclosing a copy of the 60-day letter covering the year 1921 addressed to the San Joaquin Fruit and Investment Company as transferee of the San Joaquin Fruit Company, such letter having been written under the provisions of sec-

(Testimony of M. L. McLaren.)

tion 280 of the then existing Revenue Act. Upon receipt of that letter, I looked at it with some surprise because it at once occurred to me that a situation had been existing for several years which I had not been aware of, and of which the officers of the company had not been aware of, and that was, the San Joaquin Fruit and Investment Company was in fact transferee for all years, and in the latter part of 1927 I realized that fact for the first time. I at once communicated with the San Francisco attorney, Mr. George M. Naus, who had been associated with the case, and after some discussion with him and Mr. Dana Latham, the three of us in cooperation prepared [137] amended petitions to be filed with the Board of Tax Appeals covering appeals in Docket Nos. 6988 and 6989.

The circumstances which relate to Docket Nos. 6988 and 6989 were identical except as to the date on which the deficiency letters were received. Contrary to any element of misrepresentation or deceit, our intention was to inform all parties of interest as to what the true facts were. Docket No. 6989 was also in the name of San Joaquin Fruit and Investment Company, formerly the San Joaquin Fruit Company. I can state positively that I never made any statement in my dealings with the Bureau of Internal Revenue that these two companies were identical except for a change of name. I never heard any officer or employee of the taxpayer make any such representation.

Q. Now, Mr. McLaren, turning to Docket No.

(Testimony of M. L. McLaren.)

20,801, covering the year 1921, that letter was addressed, this letter was addressed to the San Joaquin Fruit Company, care of San Joaquin Fruit and Investment Company. Please state why you filed an appeal in the case in the form in which you did.

A. The issues of law in the years 1918 and 1921 were identical. The 1921 letter was received a considerable length of time after the sixty-day letters for the earlier years, so that my recollection is very accurate, I believe in this respect, that the mechanics of preparing the petition covering Docket No. 20,801 for this 1921 number was merely to hand a copy of the 1918 or the 1920 petition to a stenographer and after having made pencil changes in the bookkeeping on the copy with reference to the amount involved, and the year involved the 1921 petition was copied from that altered copy of the petition for the earlier years, and that is the reason why the petition was filed for that year 1921 in the name of the San Joaquin Fruit and Investment Company, formerly the San Joaquin Fruit Company just as in the case of the earlier years.

I certainly did not have in mind, in so preparing and filing the petition, the thought of deceiving or misleading any official of the Bureau of Internal Revenue or any official or member of the Board of Tax Appeals.

[138] The MEMBER.—You say you filed the petition in all three of these cases?

The WITNESS.—I did.

The MEMBER.—In Docket No. 20,801 who au-

(Testimony of M. L. McLaren.)

thorized you to file the petition? How did you come to file the petition in that case?

The WITNESS.—The sixty-day letter was received by the company in due course.

The MEMBER.—By what company?

The WITNESS.—The San Joaquin Fruit and Investment Company.

The MEMBER.—Your name is N. L. McLaren?

The WITNESS.—That is right.

The MEMBER.—You signed the petition together with George M. Naus, counsel for petitioner. Now, who authorized you to sign as counsel for the petitioner?

The WITNESS.—The San Joaquin Fruit and Investment Company through its officers.

The MEMBER.—What officers?

The WITNESS.—Messrs. E. C. Utt, and the vice-president.

The MEMBER.—Did you have any authorization from the San Joaquin Fruit Company?

The WITNESS.—No, because that company was not in existence.

The MEMBER.—To file a petition?

The WITNESS.—No, it was not in existence.

The MEMBER.—Did you purport to act for them at all in filing this petition?

The WITNESS.—That question was never raised because it was a matter that did not occur to us at all.

(Testimony of M. L. McLaren.)

[139] Cross-examination.

It is perfectly true as a matter of fact that I never considered the question of the two companies until after the 280 letter was sent to the San Joaquin Fruit and Investment Company. I never did, at any time. I did not regard the two names as being the two names of the same corporation. I did not regard the matter at all. The matter was of no concern to me at all. I was concerned with the legal issues in the case and not distinctions between the two corporations. I did not take up with the officers or directors of the San Joaquin Fruit and Investment Company the difference in name; the matter was never discussed to the best of my recollection. The sixty-day letter was addressed to the San Joaquin Fruit and Investment Company. The taxpayer was the San Joaquin Fruit Company. Under the rules of the Board and under the procedure followed in a case of this sort, in view of the fact that the Board had not been in existence very long at this time, we would be more or less feeling our way in matters of this character, and it would have been necessary for us only to have filed a petition in the name of the San Joaquin Fruit and Investment Company, but because the taxpayer was the San Joaquin Fruit Company we felt that in order to round out the picture it would be advisable to file a petition in the name of the San Joaquin Fruit and Investment Company with the explanation in brackets as showing the situation, formerly the San Joaquin Fruit Company.

(Testimony of M. L. McLaren.)

In the rules of the Board forms are prescribed or presented for filing of pleadings, and we evidently in the earlier years tried to follow them very closely, and when it came to putting in the name of the petitioner it occurred to me that in order to make the picture complete it would be well to add that explanatory matter; there was nothing in the rules that I know of which required the adding of that explanatory matter; it was merely incorporated for the benefit of the Commissioner.

[140] I have been handling this case since the early part of 1923. I will not state positively either that I did or did not discuss the question of there being two corporations with the Income Tax Unit. I had nothing whatever to do with preparing the appeal of the San Joaquin Fruit Company or the San Joaquin Fruit and Investment Company for the calendar year 1922, Docket No. 27,038. I never furnished Mr. Parker with a copy of the petition I filed in those other cases nor have I discussed the matter with Mr. Parker or anyone in his office.

The first time I attached any significance to the legal distinction between the two corporations, the San Joaquin Fruit and Investment Company and the San Joaquin Fruit Company, was when I received that 280 letter in December, 1927. I did not consider it. I am a certified public accountant admitted to practice before this Board.

The MEMBER.—The questions that you (the petitioner) have asked these witnesses are all along

(Testimony of M. L. McLaren.)

the line of showing good faith in the matter. The question that I asked was not entirely a question of good faith, but the question of why one company that did not have anything to do with another company would bother about or interest itself in another company's business. That is, your petition here suggests you are the successor to that company. You simply show in your direct examination and in the articles of dissolution and the minutes the fact of the incorporation of the other company. Now, what relationship there was between them or what points of similarity there were, or what points of difference there is is left to conjecture, largely because those formal matters indicate there was one corporation begun away back in 1906 and running up to December, 1922, and before it went out of existence there was another begun. What occasion was there for one company to feel called upon to defend the other in its tax liability. We have never been informed on that.

[141] Thereupon counsel for petitioner announced that he had no more evidence. The following colloquy was then had:

Mr. FOLEY.—Before the testimony is closed, if the Board please, I will ask counsel if he is willing to let me read into evidence statements made in the appeal in Docket No. 27,038, covering the year 1922. In case he is not so willing I desire to subpoena Mr. Gamble or whoever is custodian of the records of the Board and establish certain facts

(Testimony of M. L. McLaren.)

regarding the filing of this appeal and the statements made therein.

* * * * * * * * * * *

The MEMBER.—Do you want to offer in evidence, then, for the record the petitioner's files in this docket number here?

Mr. FOLEY.—I want to read in evidence excerpts from the petition filed by the San Joaquin Fruit and Investment Company as successor to the San Joaquin Fruit Company through change of name only as the taxpayer, as bearing upon the defense that I have been making to-day to the taxpayer's attempt to show that there were two corporations by raising the principle of estoppel, that the taxpayer is estopped to state that there are two corporations and that there is not merely one corporation with a change of name.

The MEMBER.—Is there any objection to his reading this?

Mr. LATHAM.—There is, if your Honor please. In the first place, as I have said already, it is incompetent, irrelevant and immaterial as far as this proceeding is concerned. The only way by which it could possibly be admissible it would seem to me would be as an admission against interest. It affects a different year than the year herein involved.

The MEMBER.—Would you admit that the petition was filed containing the statement Mr. Foley has stated?

(Testimony of M. L. McLaren.)

Mr. LATHAM.—I will admit that, your Honor, although I did not know anything about it until now.

The MEMBER.—Let us see whether we can get something admitted and then I will rule on it.

Mr. LATHAM.—I will admit that was filed.

The MEMBER.—We will have to find out what it is.

Mr. LATHAM.—I will admit that a petition bearing Docket No. 27038 was filed, and that the petitioner appears to be the San Joaquin Fruit and Investment Company, successor to the San Joaquin Fruit Company, change of name only.

[142] The MEMBER.—That appears at the top of the petition?

Mr. LATHAM.—Yes, sir, that appears at the top of the petition.

The MEMBER.—Now, will you admit the verification of the petition there? That that petition was verified?

Mr. LATHAM.—I will also admit that the petition appears to be verified by one C. V. Newman, Secretary and that in the jurat says that said corporation, referring to the San Joaquin Fruit and Investment Company, succeeded to the San Joaquin Fruit Company through change of name only during the year 1922 and is the petitioner referred to in the foregoing petition.

Mr. FOLEY.—Are you prepared to admit also that Mr. C. V. Newman was secretary of the San Joaquin Fruit and Investment Company?

(Testimony of C. E. Utt.)

Mr. LATHAM.—I will concede that.

Mr. FOLEY.—And he was duly authorized to and did sign for the San Joaquin Fruit and Investment Company?

Mr. LATHAM.—No, I can't concede that, because I do not know it.

Mr. FOLEY.—I will call a witness on that, then.

The MEMBER.—You will admit what you have admitted, but your contention is it is incompetent, and irrelevant to this proceeding?

Mr. LATHAM.—Oh, absolutely, your Honor.

The MEMBER.—You object to this matter being put into evidence for that reason?

Mr. LATHAM.—Yes, and I move that this offer as read into the record be stricken.

The MEMBER.—I will deny your motion to strike that from the record on the reason stated, and it will be admitted for whatever it may be worth, to show what Mr. Foley offered it for the purpose stated.

Mr. LATHAM.—I ask an exception.

The MEMBER.—An exception will be noted.

TESTIMONY OF C. E. UTT, FOR RESPONDENT (RECALLED).

Thereupon C. E. UTT, having been called as a witness on behalf of the respondent and having been previously duly sworn, was examined and testified as follows:

Direct Examination.

C. V. Newman, whose name appears on the peti-

(Testimony of C. E. Utt.)

tion filed with the Board of Tax Appeals under Docket No. 27,038, was, during the year 1922, connected with the San Joaquin Fruit and Investment Company in the capacity of manager and also assistant secretary. That is his signature on the petition. I am not [143] certain whether he was secretary or assistant secretary, but he was one or the other. There is no question about that signature on the petition being Mr. Newman's.

Thereupon both sides announced they had no further testimony to offer.

During the course of the argument before the Board the following colloquy was had:

Mr. FOLEY.—Now I want to briefly make a few suggestions regarding my opponent's argument. Throughout his argument he referred to estoppel and he was very evidently laboring under the impression that the Commissioner was seeking to raise what is called an estoppel *in pais,* or equitable estoppel. That is one arising out of a misrepresentation by one party which is believed in and acted upon by the opposite party to his detriment, and therefore the person who believes in and acts upon this misrepresentation is entitled to have the Court say to the one who had deceived him, "Having deceived this man before, you can't now tell us the truth." That is an inequitable estoppel, and it is not the estoppel we rely upon at all. We rely upon the estoppel, which is akin to the familiar estoppel of the tenant to deny his landlord's title and in that estoppel there is no trace,—there

is essentially no trace or no element whatever of deceit. If I go into possession of a certain property as your tenant, I am estopped to deny your title whether I know you had one or not, and equally you are estopped to deny my tenancy whether you know you had title or not. Misrepresentation and deceit is entirely absent. Now, I want to cover that more fully in my brief, but I want to correct right now the misapprehension which I was afraid might be raised.

The MEMBER.—What are the facts in this case that make it parallel to that situation, Mr. Foley? Would you mind stating that for me?

Mr. FOLEY.—Yes. The deficiency letters are sent out and appeals are filed and the cases await trial for a long time. They are then actually tried, tried on the merits on all issues other than special assessment, and then a year after that trial is held—

The MEMBER.—(Interposing.) Is decision rendered?

Mr. FOLEY.—No, decision has not been rendered. A year after the trial is held the taxpayer attempts to say that it is not really the taxpayer at all, that the taxpayer is somebody else and he did not have authority to file this appeal. He ought never to have done anything.

[144] Counsel for respondent then directed the Board's attention to the fact that the amended petitions in Docket Nos. 6988 and 6989 had been filed pursuant to an order entered by the Board upon an *ex parte* motion of petitioner, and that respondent had had no opportunity to make objection to the

amended petitions being filed. He stated that the records of the Board disclosed that *ex parte* motion of petitioner to file its amended petitions was filed with the Board on April 4, 1928; that the order permitting the filing of the amended petitions was entered on April 5, 1928 and that notice of the motion and order was not received by respondent until April 9, 1928.

The petitioner on review submits the foregoing as a true and correct statement of all of the evidence material to this appeal which was submitted before the United States Board of Tax Appeals, and prays that the same may be approved and filed as a part of the record in this cause.

C. M. CHAREST,
F.,
General Counsel,
Bureau of Internal Revenue,
Attorney for Petitioner on Review.

No objection will be made to the foregoing statement of evidence.

J. R. SHERROD,
J. B. MILLIKINS,
Attorneys for Respondent on Review.

Approved and ordered filed this 21 day of Nov., 1930.

(Signed) J. E. MURDOCK,
Member.

The foregoing statement of evidence is hereby approved as a true and correct statement of all of the evidence adduced before the United States Board of Tax Appeals which is relevant and material to the

issues presented by the petition for review filed with the United States Circuit Court of Appeals for the Ninth Circuit; such evidence includes Petitioner's Exhibits 1 ad 2 received at the hearing on May 3, 1927, and Petitioner's Exhibits 1, 3 to 6, inclusive; and 8 to 17, inclusive, received at the hearing in Washington on October 16, 1928, and said exhibits called for in the praecipe and transmitted herewith are either the original exhibits introduced in evidence, or true copies thereof substituted by transmission of the Board. Such statement of evidence is approved, signed and ordered to be made a part of the record in this cause this —— day of November, 1930.

_____,

Member, United States Board of Tax Appeals.

Now, Dec. 18, 1930, the foregoing statement of evidence certified from the record as a true copy.

[Seal] _____,

Clerk, U. S. Board of Tax Appeals.

PETITIONER'S EXHIBIT No. 1.

[145] U. S. Board of Tax Appeals. Div. 1. Docket 6988–89, 20,801. Admitted in Evidence May 3, 1927. Petitioner's Exhibit 1.

IT:CA:2554–11.

Feb. 3, 1926.

San Joaquin Fruit Company,
Tustin, California.

Sirs: Reference is made to your request dated December 3, 1925, that your profits tax for the year 1921 be computed under the provisions of Sections 327 and 328 of the Revenue Act of 1921.

In this connection, you are advised that the period

within which the Commissioner may assess additional tax for the year will expire in the near future, and that the waiver filed by you is not acceptable to the Commissioner. In order that the Bureau may proceed in the regular manner in the consideration of your application and to avoid the possible necessity of making immediate assessment under the provisions of Section 274 (d) of the Revenue Act of 1924, it is requested that you properly execute and return to this office the enclosed form of waiver, within twelve days from the date of this letter.

Before consideration can be given your application, there must be a final determination of your net income; therefore, it will be necessary for you to advise this office within twenty days from the date of this letter of your acquiescence in the following determination of your net income disclosed by an audit of your return in connection with the revenue agent's report dated December 8, 1925, or exceptions, if any, which you may take thereto:

1921

Net Income.

Net income shown on return	$77,814.71
Add:	
1. Depreciation disallowed	42,187.62
Corrected net income	$120,002.33

[146] San Joaquin Fruit Company

Explanation of Adjustment to Net Income

1. Depreciation claimed on return	$69,240.59
Depreciation allosed	27,052.97
Depreciation disallowed	$42,187.62

This office holds that the rates of depreciation allowed by the revenue agent are reasonable and in accordance with Article 161 of Regulations 62.

Invested Capital.

Capital stock and surplus as shown by your balance sheets as of January 1, 1921, ...		$544,249.80
Add:		
1. Depreciation restored for prior years		97,836.28
Total		$642,086.08
Deduct:		
2. 1920 tax, $36,649.67, prorated	$15,488.15	
3. Additional taxes for 1917, 1918, 1919	150,227.81	
4. Dividend $60,000 paid March 23, 1921	31,201.26	196,917.22
Balance		$445,168.86
Deduct proportion of inadmissibles .0178		7,924.01
Corrected invested capital		$437,244.85

Explanation of Adjustments to Invested Capital.

1. The correct tax has been prorated.

2. Since the taxes for years prior to 1920 are deemed to have been paid out of surplus prior to January 1, 1921, they may not be included in surplus.

3. The amount of dividend paid from surplus is computed as follows:

Available earnings for the year $120,751.27

Tentative tax for the year 31,079.41

Amount available for dividends .....$ 89,671.86
Dividends paid March 23, 1921, ...$ 60,000.00
Earnings for 81 days 19,899.78

Paid from surplus .....$ 40,100.22

[147] San Joaquin Fruit Company.

Prorated for 284 days $31,201.26

4. Inadmissible assets beginning of the year $9,983.24
Inadmissible assets at the end of the year $13,768.62
Average inadmissible assets held during the year $11,875.98
Total assets beginning of the year .$713,989.56
Total assets at end of the year $619,527.89
Average assets held during the year $666,758.73
11,875.98÷$666,758.73 equals percentage of inadmissibles .0178

Computation of Tax.

Net Income $120,002.33
Invested Capital $437,244.85
Excess Profits Credit .....$ 37,979.58
Excess Profits Tax .....$ 22,915.22

Net Income $120,002.33
Less: Interest on United States obligations not exempt $1,085.93

Profits tax	22,915.22	24,001.15
Balance subject to tax at 10%	$ 96,001.18	
Profits tax		$22,915.22
Amount of tax at 10%		9,600.12
Total tax assessable		$32,515.34
Original tax		7,672.88
Deficiency in tax		$24,842.46

You are advised that questions involving invested capital and net income as outlined herein should be raised at this time, as no further consideration will be given protests of statutory audit after a decision has been rendered under the provisions of Section 327 and 328 of the Revenue Act of 1921.

[148] San Joaquin Fruit Company.

In your reply, it is important that reference be made to the symbols IT:CA:2554–11.

Respectfully,

C. R. NASH,

Assistant to the Commissioner.

By (Signed) H. R. CLUTS,

Head of Division.

PETITIONER'S EXHIBIT No. 2.

[149] U. S. Board of Tax Appeals. Div. 1. Docket 6988–89, 20,801. Admitted in evidence May 3, 1927. Petitioner's Exhibit 2.

(730M)

TREASURY DEPARTMENT,
Washington,
November 2, 1922.

IT:SA:AS–1742.
TMM.
San Joaquin Fruit Company,
Tustin, California.

Sirs: An examination of your income tax returns and of your books of accounts and records for the years 1917–18–19–20 discloses an additional tax liability for the years 1917–18–19–20 aggregating $215,383.51 and overassessments for the years ——— amounting to $———, as shown in detail in the attached statement.

You will be given full opportunity to present to the Income Tax Unit any additional evidence bearing upon the matter or to submit any reasons why an assessment should not be made. Unless an extension of time is granted, upon a proper showing of reasons therefor, such action should be taken by you not later than 30 days from date of this letter. If such action is not taken by you within this time, the case will be closed and a decision made by the Income Tax Unit from which only an appeal to the Commissioner will be permissible.

It is the desire of the Income Tax Unit to make decisions only after a careful consideration of all the evidence pertaining to the case, and taxpayers are expected in their own interest to exercise proper diligence in the preparation and presentation of their cases to the Unit. You may present such additional evidence or exceptions by means of a sworn statement, submitted either by mail or at a conference in Washington, D. C., which may be arranged upon request for a date.

To facilitate the disposition of this case you are requested to sign and return promptly the enclosed form, stating whether you consent to the proposed assessment or whether you desire to submit additional evidence or to file exceptions to the proposed assessment.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Respectfully,
(Signed) E. H. BATSON,
Deputy Commissioner.

(727M)

[150] In re: SAN JOAQUIN FRUIT COMPANY,

Tustin, California.

....., 192..

Commissioner of Internal Revenue,
Washington, D. C.

Sir:

Receipt is acknowledged of your office letter IT:SA:As–1742 dated.....bearing identification symbols IT:SA:As–1742 TMM and showing as a result of an examination of our tax returns—

	Additional Tax Liability.	Overassessment.
Year 1917	$ 7,530.24	$.....
Year 1918	$ 97,564.43	$.....
Year 1919	$ 59,341.46	$.....
Year 1920	$ 50,947.38	$.....
Year.....	$.....	$.....
Total,	$215,383.51	$.....

Net additional tax: $215,383.51

In response thereto we hereby advise that:

(1) We accept as correct the above statement of net additional tax liability and agree to

(2) We believe the above statement of net additional tax liability is incorrect, and we desire and

its assessment in due course. OR shall proceed within the time fixed in your letter to prepare and present evidence showing that the amounts stated above should not be assessed.

(Signed) C. E. UTT,
Pres.

(NOTE: Taxpayer should sign but one of these statements.)

[151] STATEMENT.

IT:SA:As-1742.
TMM.

In re: SAN JOAQUIN FRUIT COMPANY,
Tustin, California.
1917.

Net income reported in return		$51,631.10
Depreciation deducted	$16,617.80	
Depreciation allowed	11,101.21	
Excessive depreciation, disallowed		5,516.59
		$57,147.69
Less: Officers' salary allowed		5,000.00
Net income as corrected		$52,147.69

Depreciation has been computed on actual cost of the assets and not on the appraised March 1, 1913

value. It is held that the March 1, 1913, value has no bearing on your depreciation deductions since the property at that time was merely held under a lease and was not actually purchased until 1916.

The claim for a paid-in surplus of $1,839,500.00 has been rejected. It is held that the amount claimed represents an appreciation in value above the amount actually paid for the property and does not meet the requirements of the Revenue Acts of 1917 and 1918 or the Regulations promulgated thereunder, necessary to establish the value of a paid-in surplus.

Invested capital	$212,610.72
Total profits tax	$ 7,977.91
Income tax at 2%	883.40
Income tax at 4%	1,766.79
Total tax assessable	$ 10,628.10
Original tax	3,097.86
Additional tax	$ 7,530.24

[152] In re: San Joaquin Fruit Company.

1918.

Net income reported on return	$164,773.27
Depreciation deducted ... $23,158.54	
Depreciation allowed 11,939.48	
Excess depreciation disallowed	11,219.06
Net income as corrected	$175,992.33

Invested capital January 1, 1918		$255,113.95
Depreciation restored		13,565.44
		$268,679.39
Less: Corrected 1917 tax $10,628.10 prorated		5,823.61
Average invested capital		$262,855.78
Total profits tax		$114,446.98
Income tax at 12%		7,145.44
Total tax assessable		$121,592.42
Original tax		24,027.99
Additional tax		$ 97,564.43

1919.

Net income as reported on return		$206,163.45
Depreciation deducted	$48,790.14	
Depreciation allowed	19,787.39	
Excessive depreciation, disallowed		29,002.75
Net income as corrected		$235,166.20
Invested capital January 1, 1919		$416,801.05
Depreciation restored		24,784.50
		$441,585.55
Less:		
Additional 1917 tax	$ 7,530.24	
Correct 1918 tax $121,592.42	51,385.29	58,915.53
		$382,670.02

Less deduction for inadmissibles	2,142.95
Average invested capital	$380,527.07
Total profits tax	$72,156.97
Income tax at 10%	16,019.84
Total tax assessable	$88,176.81
Original tax	28,835.35
Additional tax	$59,341.46

[153] In re: San Joaquin Fruit Company.

1920.

Net income as reported		$140,123.23
Depreciation deducted ...	$69,710.96	
Depreciation allowed	25,696.37	
Excessive depreciation, disallowed		44,014.59
Net income as corrected		$184,137.82
Invested capital January 1, 1920		$513,376.63
Depreciation restored		53,821.69
		$567,198.32
Less:		
Dividend in excess of earnings	$39,570.54	
1917 additional tax	7,530.24	
1918 additional tax	97,564.43	

1919 tax $88,176.81 prorated	37,161.94	$181,827.15
		$385,371.17
Deduction on account of inadmissibles		4,345.58
Average invested capital		$381,025.59
Total profits tax		$51,717.69
Income tax at 10%		13,007.27
Total tax assessable		$64,724.96
Original tax		13,777.58
Additional tax		$50,947.38

Recapitulation of Tax.

Year.	Assessed.	Assessable.	Additional.
1917	$ 3,097.86	$ 10,628.10	$ 7,530.24
1918	24,027.99	121,592.42	97,564.43
1919	28,835.35	88,176.81	59,341.46
1920	13,777.58	64,724.96	50,947.38
Total	$69,738.78	$285,122.29	$215,383.51

[154] STATE OF CALIFORNIA.

DEPARTMENT OF STATE.

I, FRANK C. JORDAN, Secretary of State of the State of California, do hereby certify that I have carefully compared the transcript, to which this certificate is attached, with the record on file in my office of which it purports to be a copy, and that the same is a full, true and correct copy

thereof. I further certify that this authentication is in due form and by the proper officer.

IN WITNESS WHEREOF, I have hereunto set my hand and have caused the Great Seal of the State of California to be affixed hereto this 1st day of September, A. D. 1928.

(Legal seal) FRANK C. JORDAN,
Secretary of State.
By FRANK H. CORY, (Signed)
Deputy.

PETITIONER'S EXHIBIT No. 1.

[155] U. S. Board of Tax Appeals. Div. 3. Docket 6988–89, 20801. Admitted in Evidence Oct. 16, 1928. Petitioner's Exhibit 1.

ARTICLES OF INCORPORATION

of the

SAN JOAQUIN FRUIT COMPANY.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a Corporation, under the laws of the State of California.

And for that purpose we hereby certify and set forth:

First. That the name of said Corporation is

SAN JOAQUIN FRUIT COMPANY.

Second. That the purposes for which it is formed are to buy, sell, acquire, hold, manage, improve, mortgage, lease, exchange and dispose of land,

water and water-rights, pumping-plants and distributing systems; also to engage in farming, horticulture, and the buying and selling of farming and horticultural products; also to loan and borrow money on real or personal security, and issue bonds; also to construct, acquire, manage and dispose of packing-houses, and to acquire, control, use and dispose of all kinds of personal property; and to conduct all kinds of business which may be necessary in carrying out the above purposes, and do and perform such acts as a reasonable person would in conducting his general business.

Third. That the place where its principle business is to be transacted shall be the Village of Tustin, in the County of Orange, State of California.

Fourth. That the term for which it is to exist is twenty-five years from and after the date of its incorporation.

Fifth. That the number of its Directors shall be three, [156] and the names and residences of those who are appointed for the first year are:

Names.	Residences.
C. E. Utt,	Tustin, Orange County, California.
James Irvine,	San Francisco, California.
Sherman Stevens,	Tustin, Orange County, California.

Sixth. That the amount of its capital stock shall be One hundred thousand (100,000) dollars, divided into one thousand (1,000) shares of the par value of one hundred (100) dollars.

Seventh. That the amount of said capital stock which has been actually subscribed is fifty thousand

(50,000) dollars, and the following are the names of the persons by whom the same have been subscribed, to wit:

Names of Subscribers.	No. of Shares.	Amount.
C. E. Utt	166⅔	$16,666.66⅔
James Irvine	166⅔	16,666.66⅔
Sherman Stevens	166⅔	16,666.66⅔

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 1st day of October, one thousand nine hundred and six.

C. E. UTT. (L. S.)
JAMES IRVINE. (L. S.)
SHERMAN STEVENS. (L. S.)

[157] State of California,
County of Orange,—ss.

On this 2d day of October, in the year one thousand nine hundred and six, before me, C. E. Parker, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared C. E. Utt, James Irvine and Sherman Stevens, personally known to me to be the persons whose names are subscribed to the within instrument, and they each duly acknowledge to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the said County upon the day and year last above written.

(Seal) C. E. PARKER,
Notary Public in and for County of Orange, State of California.

[158] State of California,
County of Orange,—ss.

I, C. D. Lester, County Clerk and *Ex-officio* clerk of the Superior Court of Orange County, State of California, do hereby certify the foregoing to be a full, true and correct copy of the original Articles of Incorporation of the San Joaquin Fruit Compay on file in my office and that I have carefully compared the same with original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court this 2d day of October, 1906.

[Seal] C. D. LESTER,
County Clerk.
By W. B. Williams,
Deputy Clerk.

[Endorsed]: Filed Oct. 2, 1906. C. D. Lester, Clerk. By W. B. Williams, Deputy.

[Endorsed]: Filed in the office of Secretary of State the 5th day of Oct., A. D. 1906.

C. F. CURRY,
Secretary of State.
By J. Hoesch,
Deputy.

Record Book 195, Page 3.

PETITIONER'S EXHIBIT No. 3.

[159] U. S. Board of Tax Appeals. Div 3. Docket 6988–89, 20801. Admitted in evidence Oct. 16, 1928. Petitioner's Exhibit 3.

MINUTES OF A REGULAR MEETING OF THE BOARD OF DIRECTORS
of the
SAN JOAQUIN FRUIT COMPANY.

The Board of Directors of the San Joaquin Fruit Company met in regular session on this 6th day of November, 1922, at the hour mentioned in the by-laws and in accordance therewith.

President Utt called the meeting to order and directed the secretary to call the roll.

Upon roll-call it was ascertained that the following officers and directors were present, to wit:

C. E. Utt, President and Director.

Sherman Stevens, Secretary and Director.

The President announced that a quorum was present and that the meeting was competent to proceed with business.

Thereupon President Utt read the resignation of Mr. James Irvine as Director and Vice-President of this corporation, the original of which resignation is attached hereto and is in words and figures as follows:

"November 4th, 1922.

San Joaquin Fruit Company and Board of Directors of said Corporation,
Tustin, California.

Gentlemen:

I hereby tender my resignation as Vice-President and Director of the San Joaquin Fruit Company, to take effect at the pleasure of the Board.

Yours truly,
(Signed) JAMES IRVINE."

Upon motion duly made, seconded and unanimously adopted the resignation of Mr. James Irvine was unanimously accepted.

Thereupon Stockholder James Irvine, Jr., was unanimously elected a director of the corporation. Mr. James Irvine, Jr., was present and accepted the office.

Thereupon Director James Irvine, Jr., was by motion duly made and seconded, unanimously elected Vice-President of the corporation, which office he accepted.

[160] Thereupon the following resolution was made, seconded and unanimously adopted:

RESOLVED that this corporation call a meeting of its stockholders, and the same is hereby called and ordered to be held at the office of said corporation, in the Village of Tustin, County of Orange, State of California, at the hour of ten o'clock A. M. on the 18th day of November, 1922, for the purpose of considering and acting upon the proposition to dissolve this corporation, wind up its affairs, and dispose of its assets according to law. And the Secretary of this corporation is hereby ordered and directed to give notice of the said Meeting as required by the by-laws.

There being no further business before the meeting the Board adjourned.

Signed C. E. UTT,
President.
Attest: SHERMAN STEVENS,
Secretary.

Copy, made August 25, 1928, by G. B. Martien, Cashier for San Joaquin Fruit & Investment Company.

PETITIONER'S EXHIBIT No. 4.

[161] U. S. Board of Tax Appeals, Div. 3. Docket 6988–89, 20,801. Admitted in evidence Oct. 16, 1928. Petitioner's Exhibit 4.

MINUTES OF A SPECIAL MEETING OF THE STOCKHOLDERS OF THE SAN JOAQUIN FRUIT COMPANY.

Pursuant to notice and call made, issued and given in accordance with law, the stockholders of the San Joaquin Fruit Company met in special session on this 18th day of November, 1922, at the hour of ten o'clock A M. at the office and principal place of business of the corporation, in the Village of Tustin, County of Orange, State of California.

The meeting was called to order by President C. E. Utt, who directed the Secretary of the company, Mr. Sherman Stevens, to read the resolution of the Board of Directors of the Company, passed and adopted on November 6th, 1922, calling this special meeting, which resolution is in words and figures following:

RESOLVED, that this corporation call a meeting of its stockholders, and the same is hereby called and ordered to be held at the office of said corporation, in the Village of Tustin, County of Orange, State of California, at the hour of ten o'clock A. M. on the 18th day of November, 1922,

for the purpose of considering and acting upon the proposition to dissolve this corporation, wind-up its affairs, and dispose of its assets according to law. And the Secretary of this corporation is hereby ordered and directed to give notice of the said meeting as required by the by-laws.

Mr. Stevens stated that a copy of said resolution, together with a notice of said meeting, had been given and delivered to each stockholder of the corporation.

Thereupon the President directed the Secretary to call the roll.

Upon roll-call it was ascertained that there were present in person stockholder C. E. Utt holding one share and Sherman Stevens holding one share; that there were present by proxy James Irvine, Jr., holding one share, and the San Joaquin Fruit and Investment Company holding 807 shares. That C. E. Utt held the proxy of both James Irvine, Jr., and San Joaquin Fruit & Investment Company.

It was stated that each and every share of the subscribed, issued and outstanding capital stock of the corporation was represented either by stockholders personally present or by proxy, which proxies were ordered attached to these minutes, and by this reference made a part hereof.

[162] It was further stated that inasmuch as all of the capital stock subscribed for, issued and outstanding was present, the meeting was competent to proceed with business.

Thereupon the following resolution was introduced and its adoption moved:

RESOLVED, that this corporation be dissolved, its affairs wound-up and its assets distributed according to law, and that the dissolution of this corporation is hereby resolved upon and ordered, as required by law, and the officers of this corporation are hereby authorized, directed, instructed and empowered to forthwith dissolve said corporation, wind-up its affairs and distribute its assets as required by law; they are hereby instructed to pay all claims and demands against this corporation, and to file a petition in the Superior Court of the County of Orange, State of California, for its voluntary dissolution, and to do any and all other acts to properly and legally bring about the dissolution of this corporation, to wind-up its affairs, and to distribute all its assets.

The motion for the adoption of the foregoing resolution was seconded, and thereupon it was passed and adopted by the favorable and affirmative vote of each and every stockholder of the corporation, the vote being as follows:

C. E. Utt voting for adoption the one share belonging to himself.

Sherman Stevens voting for adoption the one share belonging to himself.

C. E. Utt voting for adoption the one share belonging to James Irvine, Jr., and

C. E. Utt voting for adoption the 807 shares of the San Joaquin Fruit & Investment Company.

The President announced that the resolution had been unanimously adopted.

There being no further business before the meeting, the stockholders adjourned.

Signed, C. E. UTT,
President.

Attest: SHERMAN STEVENS,
Secretary.

PETITIONER'S EXHIBIT No. 5.

[163] U. S. Board of Tax Appeals. Div. 3. Doc. 6988–89, 20,801. Admitted in evidence Oct. 16, 1928. Petitioner's Exhibit 5.

In the Superior Court of the County of Orange, State of California.

No. 14,155.

In the Matter of the Application for Voluntary Dissolution of the SAN JOAQUIN FRUIT COMPANY.

JUDGMENT AND DECREE OF DISSOLUTION.

The verified application of the above named corporation, the SAN JOAQUIN FRUIT COMPANY, praying for a decree of voluntary dissolution, coming on regularly this 26th day of December, 1922, for hearing and determination, and proofs and evidence, both documentary and oral having been made and introduced and duly considered by the court, and it satisfactorily appearing to the court therefrom, and it having been duly shown and proven thereby, and the court finding:

That said applicant, SAN JOAQUIN FRUIT COMPANY, is, and was at the time of filing said application, and for more than ten years past past, and since its organization and incorporation, continuously has been, a corporation duly incorporated and existing under and by virtue of the laws of the State of California; with its principal place of business located in the Village of Tustin, County of Orange, State of California;

That said application, duly signed and verified as prescribed by law, and being in all respects in conformity with Title VI of Part III of the Code of Civil Procedure of the State of California, was ordered filed by the court, and notice thereof duly directed to be given by publication for 31 days; that in accordance with the order of this court in that regard, and pursuant to law, the clerk of this said court has given 31 days' notice of said application for dissolution by publication in the [164] Santa Ana Daily Evening Register, a newspaper of general circulation printed and published in the City of Santa Ana, County of Orange, State of California, the last publication of said Notice occurring on the 22nd day of December, 1922, and that notice of said application has been given for the period, in the manner, and in all respects as required by law and the order of this court; and that no objection to said application has been made or filed, or otherwise;

That each and all of the allegations and statements in said application of said San Joaquin Fruit Company for voluntary dissolution, are true as al-

leged, and have been shown to be true in all respects;

That at a meeting of the stockholders of the San Joaquin Fruit Company, called for that purpose, the dissolution of said corporation was resolved upon by a vote of more than two-thirds of the stockholders, and of the holders of more than two-thirds of the subscribed capital stock of said corporation;

That of the authorized capital stock of said corporation at all times herein mentioned there were and are now 810 shares subscribed for, issued and outstanding;

That at said stockholders meeting all of said capital stock, namely, 810 shares, voted affirmatively for the dissolution of said corporation; that the stockholders of said corporation are as follows:

Stockholders:

San Joaquin Fruit and Investment Company	807 shares;
C. E. Utt	1 share;
Sherman Stevens	1 share;
James Irvine, Jr.,	1 share.

That the Board of Directors of said corporation consists of three members and said directors are:

[165] C. E. Utt, President and Director.
James Irvine, Jr., Vice-President and Director.
Sherman Stevens, Secretary and Director.

That at the hearing of said petition and application there was filed an assign*emtn* of their three shares of stock and their beneficial interest in the dissolution of said San Joaquin Fruit Company, wherein and whereby each and every one of them

duly sold, transferred and assigned unto said San Joaquin Fruit and Investment Company their said share of stock, their said beneficial interest in said San Joaquin Fruit Company, and each and every interest that each of them had in the assets of said San Joaquin Fruit Company upon its dissolution, and the court hereby finds that all of the assets of said San Joaquin Fruit Company should be distributed directly to the said San Joaquin Fruit and Investment Company, and it is hereby ordered that the trustees hereinafter named shall distribute each and every asset and all the assets of the said San Joaquin Fruit Company unto the San Joaquin Fruit and Investment Company, to be and become the sole and exclusive property of said San Joaquin Fruit and Investment Company; a corporation organized under the laws of the State of California;

That the court hereby decrees that the present directors of said San Joaquin Fruit Company, namely, C. E. Utt, Sherman Stevens and James Irvine, Jr., are named, appointed and declared, and are hereby made the trustees for the distribution of the assets of said San Joaquin Fruit Company, and the winding-up of its affairs, and the court hereby establishes and identifies the said three persons as the directors and managers of said corporation at the time of this its dissolution, and they are hereby appointed trustees upon dissolution, for the winding-up of its affairs, its proper dissolution, and the distribution [166] of its assets;

Said directors, managers and trustees, being said C. E. Utt, Sherman Stevens and James Irvine, Jr.,

are hereby ordered to convey, grant, transfer, deed and assign unto the said San Joaquin Fruit and Investment Company each and every and all property, beneficial interest, real estate, mortgages, notes, deeds of trust, contracts, capital stock, bonds, leasehold estates, and each and every other kind of property and asset of said San Joaquin Fruit Company unto the said San Joaquin Fruit and Investment Company;

That all claims and demands against the said San Joaquin Fruit Company have been fully satisfied and discharged.

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the real estate hereinafter described, which is situated in the County of Orange, State of California, and which belongs to the San Joaquin Fruit Company at the time of this its dissolution, and an asset upon its dissolution, shall be by said directors, managers and trustees distributed, granted and conveyed unto the said San Joaquin Fruit and Investment Company, to-wit:

PARCEL 1.

All of Tract No. 282, San Joaquin Fruit Co's 1st Sub., as shown on a Map recorded in Book 14, page 3 of Miscellaneous Maps, records of Orange County, California, being a resubdivision of Lots 175, 176, 177, the South one-fourth (S.¼) of Lot 327, the South-west one-half (SW.½) of Lot 329, the South-east one-half (SE.½) of Lot 174, the South-east one-half

(SE.½) of Lot 178, the North-west one-half (NW.½) of Lot 238, the North-west one-half (NW.½) of Lot 245 and the South-westerly one-fourth (SWly.¼) of the South-easterly (SEly.½) of Block 83 of Irvine's Subdivision, as shown on a Map recorded in Book 1, page 88 of Miscellaneous Maps, records of Orange County California.

Excepting from said Tract No. 282, Lots "A3," "A4," "A5," "A9," "B3," "C2," "C7," "C8," and "R5," as shown on the Map thereof.

Including with the property hereby conveyed all right, title and interest of the grantor in the roads, boulevard, highways, streets, alleys [167] and other strips of land for road purposes designated and shown on said Map of Tract No. 282, and also including with the property hereby conveyed all right, title and interest of the grantor, if any, in the strips of land included within the boundary lines of the Pacific Electric Railway and the Atchison, Topeka & Santa Fe Railroad, as shown on said Map of Tract No. 282.

PARCEL 2.

A Tract of land containing approximately 3 acres located at the site of the grantor's Booster Plant in Lot 180 of Irvine's Subdivision, as shown on a Map recorded in Book 1, page 88 of Miscellaneous Maps, records of Orange County, California, said 3 acres being more particularly described as follows, to-wit:

Commencing at the Southerly corner of said Lot 180; thence North 40° East 660 feet to a point; thence North 50° West 200 feet to a point; thence South 40° West 660 feet to a point on the center line of the State Highway; thence South 50° East 200 feet along the center line of the State Highway to the point of beginning, containing 3.03 acres.

PARCEL 3.

The right or easement (but not the title in fee),

(a) To maintain a pumping plant or plants, sink wells and develop water on all lands within a radius of 100 feet of the said grantor's well in Lot 41 of said Irvine's Subdivision, said well being more particularly located at a point South 40° West 1850 feet from the center line of the State Highway, and South 50° East 605.9 feet from the North-westerly Lot line of Lot 41 of the Irvine's Subdivision, as shown on a Map recorded in Book 1, page 88 of Miscellaneous Maps, records of Orange County, California;

(b) To maintain pumping plant or plants, sink wells and develop water on all land within a radius of 100 feet of a point located North 50° West 31.5 feet from the grantor's present well in Lot 43 of the said Irvine's Subdivision, said well being more particularly located at a point South 40° West 1871.6 feet from the center line of the State Highway, and North 50° West 98.5 feet from the Southeasterly Lot line of the said Lot 43.

(c) To maintain pumping plant or plants, sink wells and develop water on all land within a radius of 100 feet from a point located at grantor's present well and pumping plant in Lot 44 on the said Irvine's Subdivision, said point being more particularly located as South 40° West 1883 feet from the center line of the State Highway and North 50° West 179.8 feet from the Southeasterly Lot Line of said Lot 44;

[168] Together with the right of ingress and egress to each of the 3 above described locations conveyed to the grantor herein by the Irvine Company by deed dated October 19th, 1918, over roads then existing or which may thereafter be laid out.

PARCEL 4.

An easement and right-of-way for the maintenance of a continuous pipe-line for conveying water from the pumping plants and wells mentioned and described above to the site of the Booster Plant above described, and thence to the land included within Tract No. 282 along a line particularly described as follows, to-wit:

Commencing at a point near well location No. C, as above described, south 40° West 1879 feet from the center line of the State Highway, and North 50° West 146 feet from the South-easterly Lot line of Lot 44; thence South 49° 21′ East 1295 feet to a point near well location No. B, South 40° West 1895 feet and North 50° West 168 feet from the South-easterly Lot

line or Lot 43; thence South 51° 36′ East 2073 feet to a point 12 feet North of well location No. A; thence South 86° 15′ East 4000 feet to a point near the above mentioned Booster Plant on said 3 acre tract; thence from a point in said 3 acre tract North 40° East 615 feet from the center line of the State Highway and North 50° West 30 feet from the Southeasterly lot line of Lot 180 South 86° 45′ East 3330 feet, more or less, to the point where said pipe-line intersects the San Joaquin Fruit Company's property line near the Westerly corner of Lot 175.

All of the lands, rights of way and property above described as Parcel 1, Parcel 2, Parcel 3 and Parcel 4 are subject to the reservations, exceptions, restrictions, covenants and conditions contained in the Deed from the Irvine Company to the San Joaquin Fruit Company, dated October 19th, 1918, recorded in Book 328, page 88 of Deeds, records of Orange County, California.

PARCEL 5.

All real property of every kind and character in Orange County, California, belonging to the grantor herein in addition to the property hereinbefore described together with all rights-of-way, easements and water rights used in connection with said real property or appurtenant thereto.

[169] IT IS FURTHER*E* ORDERED, ADJUDGED and DECREED, that all personal prop-

erty and all other property of every kind and nature not hereinbefore specifically described, shall be by said directors, managers and trustees, distributed, transferred, granted and assigned unto the said San Joaquin Fruit and Investment Company.

IT IS FURTHER ORDERED, ADJUDGED and DECREED, that said corporation, the said San Joaquin Fruit Company be, and it is hereby dissolved, and declared dissolved.

IT IS FURTHER, ORDERED, ADJUDGED and DECREED, that the respective interests of the stockholders of said San Joaquin Fruit Company, have hereinbefore been fixed, namely, there were four stockholders as herein named, three of whom have assigned their whole interest herein unto the said San Joaquin Fruit and Investment Company, and that now the San Joaquin Fruit and Investment Company is the only stockholder, and the only person to whom said property and assets of said San Joaquin Fruit Company shall be distributed and conveyed.

Done in open court this 26th day of December, 1922.

R. Y. WILLIAMS, (Signed)
Judge of Said Superior Court.

State of California,
County of Orange,—ss.

I, J. M. Backs, County Clerk and *Ex-officio* Clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of the original on file in my office.

WITNESS my hand and the seal of the Superior Court this 27th day of December, 1922.

(Legal Seal) J. M. BACKS,
County Clerk.

By ————————————,
Deputy Clerk.

PETITIONER'S EXHIBIT No. 6.

[170] U. S. Board of Tax Appeals. Div. 3. Docket 6988–89, 20,801. Admitted in evidence Oct. 16, 1928. Petitioner's Exhibit 6.

Frank C. Jordan, Secretary of State. Frank H. Cory, Deputy.

STATE OF CALIFORNIA.

DEPARTMENT OF STATE.

I, FRANK C. JORDAN, Secretary of State of the State of California, do hereby certify that a copy of the Decree of the Superior Court of the State of California, in and for the County of Orange, dissolving SAN JOAQUIN FRUIT COMPANY, a corporation duly certified by the County Clerk of the County of Orange, was filed in this office on the 29th day of December A. D. 1922.

WITNESS my hand and the Great Seal of State, at office in Sacramento, California, the 1st day of October, A. D. 1928.

(Seal) FRANK C. JORDAN, (Signed)
Secretary of State.

By FRANK H. CORY, (Signed)
Deputy.

PETITIONER'S EXHIBIT No. 8.

[171] U. S. Board of Tax Appeals. Div. 3. Docket 6988–89, 20,801. Admitted in Evidence Oct. 16, 1928. Petitioner's Exhibit 8.

No. 13749

Frank C. Jordan, Secretary of State. Frank H. Cory, Deputy.

STATE OF CALIFORNIA.

DEPARTMENT OF STATE.

I, FRANK C. JORDAN, Secretary of State of State of California, do hereby certify that I have carefully compared the annexed copy of Articles of Incorporation of "SAN JOAQUIN FRUIT AND INVESTMENT COMPANY" with the original now on file in my office, and that the same is a correct transcript therefrom, and of the whole thereof. I further certify that this authentication is in due form and by the proper officer.

IN WITNESS WHEREOF, I have hereto set my hand and have caused the Great Seal of the State of California to be affixed hereto this 24th day of July, A. D. 1922.

(Seal)

FRANK C. JORDAN,
Secretary of State.
FRANK H. CORY,
Deputy.

[172] ARTICLES OF INCORPORATION.
of the
SAN JOAQUIN FRUIT AND INVESTMENT COMPANY.

KNOW ALL MEN BY THESE PRESENTS: That we, the undersigned, a majority of whom are citizens and residents of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California.

AND WE HEREBY CERTIFY:

First: That the name of said corporation shall be "SAN JOAQUIN FRUIT AND INVESTMENT COMPANY."

Second: That the purposes for which it is formed are:

To buy, sell, acquire, hold, manage, improve, mortgage, lease, exchange and dispose of land, water and water-rights, pumping plants and distributing systems; also to engage in farming, horticulture and the buying and selling of farming and horticultural products; also to loan and borrow money on real or personal security; also to construct, acquire, manage and dispose of packing houses, and to conduct all kinds of business which may be necessary in carrying out the above purposes.

To buy, sell, lease, let, mortgage, receive, hypothecate, deed in trust and to otherwise deal in real, mixed and personal property of every kind and

description and [173] leasehold and other estates and interests therein.

To buy, sell, contract for, use, own, hold and control and otherwise acquire and generally deal in choses-in-action and other evidences of indebtedness and the stock and securities of other corporations and letters-patent and inventions.

To create and incur indebtedness and to evidence such indebtedness by the issuance and execution of bonds, notes and other instruments in writing and to create and issue bonds, notes and evidences of indebtedness and to secure the same by mortgage, pledge, deed of trust or other instrument or in any other manner that may be according to law.

To become endorser, guarantor, or security upon promissory notes, bonds and other obligatory writings.

To have the powers to do those acts, things and deeds as are set forth in Section 354 of the Civil Code of the State of California.

Third: That the place where its principal business is to be transacted shall be the Village of Tustin, in the County of Orange, State of California.

Fourth: That the term for which it is to exist is fifty years from and after the date of its incorporation.

Fifth: That the number of its Directors shall be three, and the names and residences of those who are appointed for the first year are:

[174] Loyd Wright, Los Angeles, California,
Zelma Martin, Los Angeles, California,
Helen Driscoll, Los Angeles, California.

Sixth: That the amount of the capital stock of the said corporation is $1,500,000.00, and the number of shares into which it is divided is 15,000 of the par value of $100.00 each.

Seventh: That the amount of said capital stock which has been actually subscribed is $300.00, and the following are the names of the persons by whom the same has been subscribed:

Name of Subscriber:	No. of Shares:	Amount:
Loyd Wright	One	$100.00
Zelma Martin	One	$100.00
Helen Driscoll,	One	$100.00

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 12th day of July, 1922.

LOYD WRIGHT.
ZELMA MARTIN.
HELEN DRISCOLL.

State of California,
County of Los Angeles,—ss.

On this 12th day of July, 1922, before me, ARTHUR WRIGHT, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared LOYD WRIGHT, ZELMA MARTIN and HELEN DRISCOLL, known to me to be the persons whose names are subscribed to the within instrument and who acknowledged to me that they executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and official seal the day and year in this certificate first above written.

(Seal—Legal) ARTHUR WRIGHT,
Notary Public in and for the County of Los Angeles, State of California.

(Notarial Seal)

The foregoing instrument is correct copy of the original on file in this office.

Attest October 5th, 1928.

J. M. BACKS,
County Clerk and Clerk of the Superior Court in and for the County of Orange, State of California.

By Ora Tetzlaff,
Deputy.

PETITIONER'S EXHIBIT No. 9.

[175] U. S. Board of Tax Appeals. Div. 3. Docket 6988–89, 20,801. Admitted in evidence Oct. 16, 1928. Petitioner's Exhibit 9.

Form NP–2.

IT:E:SM.
CLB–A–5657.
B–3066–60D.

San Joaquin Fruit & Investment Company,
Tustin, California.

Sirs:

The determination of your income tax liability for the years 1918 and 1919 has resulted in a deficiency in tax aggregating $111,281.07, as set forth in Bureau letters dated March 9, 1925 and April 22, 1925.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM:CLB–A–5657, B–3066–60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,
D. H. BLAIR,
Commissioner.
By C. B. ALLEN, (Signed)
Acting Deputy Commissioner.

Inclosures:
Statements.
Agreement—Form A.

[176] STATEMENT.

IT:E:SM.
CLB–A–5657.
B–3066–60D.

In re: SAN JOAQUIN FRUIT & INVESTMENT CO.,
Tustin, California.

Year.	Deficiency.
1918	$ 66,147.93
1919	45,133.14
Total	$111,281.07

After a careful review of your protests dated April 8, 1925, and May 6, 1925, and of all the evidence submitted in support of your contentions, you are advised that the Bureau holds that an allowance for depreciation cannot be computed on the fair market value as at March 1, 1913, of property which was purchased and acquired in 1916. Accordingly, the conclusions set forth in Bureau letters dated March 9, 1925 and April 22, 1925, are sustained.

PETITIONER'S EXHIBIT No. 10.

[177] U. S. Board of Tax Appeals. Div. 3. Docket 6988–89, 20,801. Admitted in Evidence Oct. 16, 1928. Petitioner's Exhibit 10.

(1639M) Form NP–2

TREASURY DEPARTMENT,
Washington.

Jul. 27, 1925.

IT:E:SM.
CLB–C584–60D.
San Joaquin Fruit and Investment Company,
Tustin, California.

Sirs:

An audit of your income and profits tax return for the year ended December 31, 1920 has resulted in the determination of a deficiency in tax of $22,-872.09 as shown in Bureau letter dated June 16, 1925.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60-days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Com-

missioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM:CLB:584–60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,
D. H. BLAIR,
Commissioner.
By C. B. ALLEN, (Signed)
Acting Deputy Commissioner.

Enclosures:
Statements.
Agreement—Form A.

[178] IT:E:SM.
CLB–C584–60D.

SAN JOAQUIN FRUIT AND INVESTMENT CO.,
Tustin, California.

Year Involved	Deficiency in Tax.
Calendar year 1920.	$22,872.09.

No additional information having been submitted relative to your application for the assessment of your profits tax for the calendar year 1920 under the provisions of Section 326 of the Revenue Act of 1918, the Bureau holds that the action of the Unit as set forth in Bureau letter dated June 16, 1925 is correct and should be sustained.

Form NP–2.

PETITIONER'S EXHIBIT No. 11.

[179] U. S. Board of Tax Appeals. Div. 3. Docket 6988–89, 20,801. Admitted in Evidence Oct. 16, 1928. Petitioner's Exhibit 11.

TREASURY DEPARTMENT,
Washington.

Sep. 1, 1926.

IT:E:SM–60D.
HMW–D–29804.
San Joaquin Fruit Company,
c/o San Joaquin Fruit and Investment Company,
Tustin, California.

Sirs:

An audit of your income and profits tax return for the calendar year 1921 has resulted in the determination of a deficiency in tax of $21,867.40 as shown in Bureau letter dated July 20, 1926.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount

of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60D-HMW-D-29804. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,

Commissioner.

By C. R. NASH, (Signed)

Assistant to the Commissioner.

Inclosures:

Form A.

Form 882.

Form NP-2.

PETITIONER'S EXHIBIT No. 12.

[180] U. S. Board of Tax Appeals. Div. 3. Docket 6988-89, 20,801. Admitted in Evidence Oct. 16, 1928. Petitioner's Exhibit 12.

TREASURY DEPARTMENT,
Washington.

December 29, 1927.

IT:E:RR–280–60D.
LJM.
San Joaquin Fruit and Investment Company,
Tustin, California.

Sirs:

As provided in Section 280 of the Revenue Act of 1926, there is proposed for assessment against you the amount of $21,867.40 constituting your liability as transferee of the assets of the San Joaquin Fruit Company, Formerly of Tustin, California, for unpaid income tax in the above amount due from the above-named taxpayer for the year 1921 as shown by the attached statement plus any accrued penalty and interest.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where the taxpayer has filed a petition and an as-

sessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P–7. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. B. ALLEN,
Deputy Commissioner.

Inclosures:
Statement.
Form A.

[181] SAN JOAQUIN FRUIT AND INVESTMENT COMPANY,

Transferee.

STATEMENT.

IT:E:RR-280-60D.

LJM.

In re: SAN JOAQUIN FRUIT COMPANY, Tustin, California.

1921—Deficiency in Tax—$21,867.40.

You are advised that after careful consideration and review, your application under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of Revenue Act of 1918 has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

1921.			
Profits tax (Section 328)			$19,609.60
Net income as reported by Revenue Agent		$120,002.33	
Less:			
Interest on U. S. Obligations not exempt	$ 1,085.93		
Profits tax	19,609.60	20,695.53	
Balance		$ 99,306.80	
Tax at 10%			9,930.68
Total tax assessable			$29,540.28
Original tax #401704			7,672.88
Deficiency in tax			$21,867.40

Section 281 of the Revenue Act of 1926 provides that notice of a deficiency or other liability if mailed to the taxpayer or other person subject to liability at his last known address shall be sufficient for the purposes of this title even if such taxpayer or other person is deceased or is under a legal disability, or in the case of a corporation has terminated its existence.

Form NP–1.

(1638M)

PETITIONER'S EXHIBIT No. 13.

[182] U. S. Board of Tax Appeals. Div. 3. Docket 6988–89, 20,801. Admitted in Evidence Oct. 16, 1928. Petitioner's Exhibit 13.

TREASURY DEPARTMENT,
Washington.

Aug. 8, 1924.

IT:E:SM.
CLB–A–5657.
San Joaquin Fruit and Investment Company,
Tustin, California.
Sirs:

An audit of your income and profits tax return for the calendar year 1918 has resulted in the determination of a deficiency in tax amounting to $69,359.79, as indicated in the attached statement.

You are granted 30 days from the date of this letter within which to present a protest, supported by additional evidence or brief, against this determination of a deficiency. Upon request submitted within the period mentioned, you will also be

granted a hearing in the Bureau with reference to the matter. A request for a hearing should contain (a) the name and address of the taxpayer; (b) in the case of a corporation, the name of the State of incorporation; (c) a designation by date and symbol of the notice or notices with respect to which the hearing is desired; (d) a designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings of the Unit to which the taxpayer takes exception; and (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception.

If, after consideration of any additional evidence submitted and any arguments advanced by you, a deficiency is finally determined by the Bureau to be due from you, you will, in accordance with the provisions of Section 274 of the Revenue Act of 1924, be advised by registered mail of the final determination of the Commissioner as to the amount of the deficiency, and allowed 60 days from the mailing of the letter in which to file an appeal to the Board of Tax Appeals in the event you do not acquiesce in such final determination.

If you acquiesce in the determination of a deficiency as disclosed in this letter and the accompanying statements, you are requested to sign the enclosed agreement consenting to the assessment of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM–CLB:A:5657. In the event that you acquiesce in a part of the deter-

mination, the agreement should be executed with respect to the items agreed to.

Respectfully,
J. G. BRIGHT, (Signed)
Deputy Commissioner.

Enclosures:
Statements.
Agreement—Form A.

[183] STATEMENT.

IT:E:SM.
CLB-A-5657.
In re: SAN JOAQUIN FRUIT AND INVESTMENT CO.,
Tustin, California.
1918.
Additional Tax—$69,359.79.

After careful consideration and review your application for assessment of your excess profits tax under Section 328 of the Revenue Act of 1917 has been allowed. Your excess profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

The computation of the revised tax liability is shown below:

Profits tax (Section 328)			$82,396.25
Net income, agreed to by taxpayer		$175,992.33	
Less:			
Profits tax	$82,396.25		
Exemption	2,000.00	84,396.25	
Taxable at 12%		$91,596.08	10,991.53
Total tax assessable			$93,387.78
Tax assessed:			
Original #401285			24,027.99
Additional tax			$69,359.79

PETITIONER'S EXHIBIT No. 14.

(1638M) Form NP–1.

[184] U. S. Board of Tax Appeals. Div. 3. Docket 6988–89, 20801. Admitted in Evidence Oct. 16, 1928. Petitioner's Exhibit 14.

TREASURY DEPARTMENT,
Washington.

Mar. 9, 1925.

IT:E:SM.
CLB–A–5657.
San Joaquin Fruit and Investment Co.,
Tustin, California.

Sirs:

An audit of your income and excess profits tax returns for the calendar year 1918 has resulted in the determination of a deficiency in tax of $66,147.93 as shown in the attached statement.

You are granted 30 days from the date of this letter within which to present a protest, supported by additional evidence or brief, against this determination of a deficiency. Upon request submitted within the period mentioned, you will also be granted a hearing in the Bureau with reference to the matter. A request for a hearing should contain (a) the name and address of the taxpayer; (b) in the case of a corporation, the name of the State of incorporation; (c) a designation by date and symbol of the notice or notices with respect to which the hearing is desired; (d) a designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e)

an itemized schedule of the findings of the Unit to which the taxpayer takes exception; and (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception.

If, after consideration of any additional evidence submitted and any arguments advanced by you, a deficiency is finally determined by the Bureau to be due from you, you will, in accordance with the provisions of Section 274 of the Revenue Act of 1924, be advised by registered mail of the final determination of the Commissioner as to the amount of the deficiency, and allowed 60 days from the mailing of the letter in which to file an appeal to the Board of Tax Appeals in the event you do not acquiesce in such final determination.

If you acquiesce in the determination of a deficiency as disclosed in this letter and the accompanying statements, you are requested to sign the enclosed agreement consenting to the assessment of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM–CLB:A:5657. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

J. G. BRIGHT, (Signed)

Deputy Commissioner.

Enclosures:

Statements.

Agreement—Form A.

[185] STATEMENT.

IT:E:SM.
CLB-A-5657.

In re: SAN JOAQUIN FRUIT AND INVESTMENT CO.,
Tustin, California.
Deficiency in Tax—$66,147.93.

A redetermination of your income and profits tax liability for the year 1918 under the provisions of Section 327 as prescribed by Section 328 of the Revenue Act of 1918 based upon the additional information and facts presented at the oral conference held with your representatives, results in the following computation.

Computation of Tax.

Income agreed to by taxpayer		$175,992.33	
Less: Profits tax			
Section 328	$78,746.41		$78,746.41
Exemption	2,000.00	80,746.41	
Taxable at 12%		$ 95,245.92	11,429.51
Total tax assessable			$90,175.92
Tax assessed:			
Original return Account #401285			24,027.99
Deficiency in tax			$66,147.93

PETITIONER'S EXHIBIT No. 15.

[186] U. S. Board of Tax Appeals. Div. 3. Docket 6988–89, 20,801. Admitted in Evidence Oct. 16, 1928. Petitioner's Exhibit 15.

(1638M.) Form NP–1

TREASURY DEPARTMENT,
Washington.

Apr. 22, 1925.

IT:E:SM.
CLB–B–3066.
San Joaquin Fruit Company,
Tustin, California.
Sirs:

An audit of your income and excess profits tax returns for the year 1919 has resulted in the determination of a deficiency in tax of $45,133.14, as shown in the attached statement.

You are granted 30 days from the date of this letter within which to present a protest, supported by additional evidence or brief, against this determination of a deficiency. Upon request submitted within the period mentioned, you will also be granted a hearing in the Bureau with reference to the matter.

A request for a hearing should contain (a) the name and address of the taxpayer; (b) in the case of a corporation, the name of the State of incorporation; (c) a designation by date and symbol of the notice or notices with respect to which the hearing is desired; (d) a designation of the year or years

involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings of the Unit to which the taxpayer takes exception; and (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception.

If, after consideration of any additional evidence submitted and any arguments advanced by you, a deficiency is finally determined by the Bureau to be due from you, you will, in accordance with the provisions of Section 274 of the Revenue Act of 1924, be advised by registered mail of the final determination of the Commissioner as to the amount of the deficiency, and allowed 60 days from the mailing of the letter in which to file an appeal to the United States Board of Tax Appeals in the event you do not acquiesce in such final determination.

If you acquiesce in the determination of a deficiency as disclosed in this letter and the accompanying statements, you are requested to sign the enclosed agreement consenting to the assessment of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM–CLB–B–3066. In the event that you acquiesce in a part of the determination the agreement should be executed with respect to the items agreed to.

Respectfully,
J. G. BRIGHT, (Signed)
Deputy Commissioner.

Enclosures:
Statements.
Agreement—Form A.

[187] STATEMENT.

IT:E:SM.
CLB–B–3066.

In re: SAN JOAQUIN FRUIT COMPANY,
Tustin, California.
Deficiency in Tax—$45,133.14.
Year 1919.

You are advised that after careful consideration and review, your application under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of Revenue Act of 1918 has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

Net Income as shown in office letter dated November 2, 1922		$235,166.20	
Less:			
Interest on obligations of the United States	$ 810.81		
Profits tax (Section 328)	56,369.95		$59,369.95
Exemption	2,000.00	59,180.76	
Balance taxable at 10%		$175,985.44	17,598.54
Tax assessable			$73,968.49
Original tax #401,447	$28,883.80		
Less: Amount abated January 19, 1921	48.45		28,835.35
Deficiency in tax			$45,133.14

In accordance with a request on file in this office, a copy of this letter is being forwarded to your representatives, S. D. Leidesdorf & Co., Southern Building, Washington, D. C.

PETITIONER'S EXHIBIT No. 16.

[188] U. S. Board of Tax Appeals. Div. 3. Docket 6988–89, 20,801. Admitted in Evidence Oct. 16, 1928. Petitioner's Exhibit 16.

Form NP–1

TREASURY DEPARTMENT,
Washington.

Jun. 16, 1925.

IT:E:SM.
CLB–C–584.
San Joaquin Fruit and Investment Co.,
Tustin, California.
Sirs:

An audit of your income and profits tax return for the year ended December 31, 1920, has resulted in the determination of a deficiency in tax of $22,-872.09 as shown in the attached statement.

You are granted 30 days from the date of this letter within which to present a protest, supported by additional evidence or brief, against this determination of a deficiency. Any additional evidence submitted should be under oath. Upon request submitted within the period mentioned, you will also be granted a hearing in the Bureau with reference to the matter.

A request for a hearing should contain (a) the name and address of the taxpayer; (b) in the case of a corporation, the name of the State of incorporation; (c) a designation by date and symbol of the notice or notices with respect to which the hearing is desired; (d) a designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings of the Unit to which the taxpayer takes exception; and (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception.

If, after consideration of any additional evidence submitted and any arguments advanced by you, a deficiency is finally determined by the Bureau to be due from you, you will, in accordance with the provisions of Section 274 of the Revenue Act of 1924, be advised by registered mail of the final determination of the Commissioner as to the amount of the deficiency, and allowed 60 days from the mailing of the letter in which to file an appeal to the United States Board of Tax Appeals in the event you do not acquiesce in such final determination.

If you acquiesce in the determination of a deficiency as disclosed in this letter and the accompanying statements, you are requested to sign the inclosed agreement consenting to the assessment of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM:CLB–C–584. In the event that you acquiesce in a part of the determination,

the agreement should be executed with respect to the items agreed to.

Respectfully,
J. G. BRIGHT,
Deputy Commissioner.
By I. F. ENES, (Signed)
Chief of Section.

Enclosures:
Statements
Agreement—Form A

[189] IT:E:SM.
CLB-C-584.

STATEMENT.

In re: SAN JOAQUIN FRUIT AND INVESTMENT CO.,
Tustin, California.
1920
Deficiency in tax—$22,872.09

You are advised that after careful consideration and review, your application under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of the Revenue Act of 1918 has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

Net income as shown by Bureau letter dated November 2, 1922		$184,137.82	
Less:			
Interest on Obligations of the U. S. not exempt	$ 347.41		
Profits tax (Section 328)	20,522.92		$20,522.92
Exemption	2,000.00	22,870.33	
Taxable at 10%		$161,267.49	16,126.75
Total tax assessable			$36,649.67
Tax assessed, Account #400606			13,777.58
Deficiency in tax			$22,872.09

PETITIONER'S EXHIBIT No. 17.

[190] U. S. Board of Tax Appeals. Div. 3. Docket 6988–89, 20,801. Admitted in Evidence Oct. 15, 1928. Petitioner's Exhibit 17.

(1638M) Form NP—1

TREASURY DEPARTMENT,
Washington.

July 20, 1926.

IT:E:SM.
HMW–D–29804.

San Joaquin Fruit Company,
c/o San Joaquin Fruit and Investment Company,
Tustin, California.

Sirs:

An audit of your income and profits tax return for the year ended December 31, 1921, has resulted in the determination of a deficiency in tax of $21,867.40, as shown in the attached statement.

You are granted 30 days from the date of this letter within which to present a protest against the deficiency proposed herein. The protest and any additional statements of facts must be executed in triplicate, under oath, and contain the following information:

(a) The name and address of the taxpayer (in the case of an individual the residence, and in the case of a corporation the principal office or place of business); (b) in the case of a corporation the name of the State of incorporation; (c) the desig-

nation by date and symbol of the letter advising of the proposed deficiency with respect to which the protest is made; (d) the designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings to which the taxpayer takes exception; (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception; and (g) in case the taxpayer desires a hearing, a statement to that effect.

If a protest is filed, any additional evidence or briefs of argument submitted will be given a careful consideration, and if the Commissioner finally determines that there is a deficiency, you will be advised thereof by registered mail in accordance with the provisions of Section 274 of the Revenue Act of 1926. Should you not agree to the deficiency as finally determined by the Commissioner, you will be allowed 60 days from the mailing of the registered letter in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

If you acquiesce in the proposed deficiency as shown in this letter and the accompanying statement, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM:-HMW–D–29804. In the event that you acquiesce in a part of such deficiency, the waiver should be

executed with respect to the items to which you agree.

Respectfully,
C. R. NASH,
Assistant to the Commissioner.
By (Signed) LESLIE GILLIS,
Acting Chief of Section.

Enclosures:
Statement
Waiver—Form A

[191] STATEMENT.

IT:E:SM.
HMW-D-29804.

In re: SAN JOAQUIN FRUIT AND INVESTMENT COMPANY,
Tustin, California.

Year.	Deficiency in Tax.
1921.	$21,867.40

You are advised that after careful consideration and review, your application under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of Revenue Act of 1921 has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

1921.

Profits tax, Section 328			$19,609.60
Net income as reported by revenue agent		$120,002.33	
Less:			
Interest on U. S. Obligations not exempt	$ 1,085.93		
Profits tax	19,609.60	20,695.53	
Balance		$ 99,306.80	
Tax at 10%			9,930.68
Total tax assessable			$29,540.28
Original tax #401704			7,672.88
Deficiency in tax			$21,867.40

A copy of this communication has been forwarded to your authorized representatives, McLaren, Goode and Company, San Francisco, California.

Now, Dec. 18, 1930, the foregoing Petitioner's Exhibits Nos. 1 and 2 filed at hearing on May 3, 1927; Petitioner's Exhibits 1; 3 to 6, inclusive; and 8 to 17, inclusive, received at hearing on Oct. 16, 1928, certified from the record as a true copy.

[Seal] ——————————,
Clerk, U. S. Board of Tax Appeals.

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[192] Filed Oct. 13, 1930. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET Nos. 6988, 6989, 20,801.

ROBERT H. LUCAS, Commissioner of Internal Revenue,

Petitioner on Review,

vs.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY,

Respondent on Review.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare a transcript of the record in this cause, and in due time, transmit the same to the Clerk of United States Circuit

Court of Appeals for the Ninth Circuit. You are requested to include in said transcript, duly certified as correct, the following documents:

1. Docket entries of proceedings before the Board in Docket Numbers 6988, 6989 and 20801.
2. Original pleadings before the Board, including:
   (a) Petition and answer in Docket No. 6988.
   (b) Petition and answer in Docket No. 6989.
   (c) Petition and answer in Docket No. 20801.
3. Application for subpoena filed on or about March 30, 1927.
4. Order continuing proceeding to reserve calendar entered on or about May 2, 1927.
5. Motion for leave to amend petitions in Docket Nos. 6988 and 6989, and order entered on or about April 5, 1928, relative to said motion.
6. Amended petitions and answers thereto in Docket Nos. 6988 and 6989.
7. Amended petition offered in Docket No. 20801.
8. Findings of fact, opinion and decision of the Board.

[193] 9. Motion of respondent to vacate decision and approve deficiencies; also order entered thereon.

10. Petition for review.
11. Statement of evidence as settled or agreed upon.
12. Petitioner's exhibits as follows:

(a) Petitioner's Exhibits Nos. 1 and 2 received at hearing on May 3, 1927.

(b) Petitioner's Exhibits 1; 3 to 6, inclusive; and 8 to 17, inclusive, received at hearing on October 16, 1928.

13. This praecipe.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Petitioner on Review.

Service of the foregoing praecipe and receipt of a copy of the same is acknowledged this 11th day of October, 1930.

(S.) JOHN B. MILLIKEN,
J. ROBERT SHERROD,
Attorneys for Respondent on Review.

Now, Dec. 18, 1930, the foregoing praecipe certified from the record as a true copy.

[Seal] _____,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 6346. United States Circuit Court of Appeals for the Ninth Circuit. David Burnet, Commissioner of Internal Revenue, Petitioner, vs. San Joaquin Fruit & Investment Company, a Corporation, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed December 23, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6346

In the United States Circuit Court of Appeals for the Ninth Circuit

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY, A CORPORATION, RESPONDENT

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
JOHN H. McEVERS,
Special Assistants to the Attorney General.
E. C. CROUTER,
Attorney.

INDEX

CITATIONS

Statutes:

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 6346

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY, A Corporation, respondent

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

PREVIOUS OPINION

The only previous opinion in the present case is that of the Board of Tax Appeals (R. 143), which is reported in 16 B. T. A. 1290.

JURISDICTION

The case involves income and profits taxes for the years 1918, 1919, 1920, and 1921 in the respective amounts of $66,147.93, $45,133.14, $22,872.09, and $21,867.40. (R. 31, 70, 109.) This appeal is taken from an order of the Board of Tax Appeals

entered June 29, 1929 (R. 151), and is brought to this court by petition for review filed December 26, 1929 (R. 154), pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110.

QUESTIONS PRESENTED

1. Having appealed to the Board of Tax Appeals and admitted that it was the taxpayer prior to the running of the time within which assessment could be made against the San Joaquin Fruit Company, was the respondent estopped to deny that it was the taxpayer after such statute of limitations had run?

2. Having determined that the respondent was not the original taxpayer but a transferee of that company, should the Board of Tax Appeals have retained jurisdiction and determined the respondent's liability as transferee?

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 2. (a) When used in this Act—
>
> (1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.
>
> * * * * *
>
> (9) The term "taxpayer" means any person subject to a tax imposed by this Act.
>
> * * * * *
>
> SEC. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax im-

posed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

* * * * *

SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed * * * shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations * * * as in the case of the taxes imposed by this title * * *.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 274. (e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor

is asserted by the Commissioner at or before the hearing or a rehearing.

SEC. 280 (a) The amounts of the following liabilities shall, except as hereinafter in this section provide, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title * * *:

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

* * * * *

(f) As used in this section, the term "transferee" includes * * * distributee.

SEC. 283. (b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 274 of the Revenue Act of 1924 * * * and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section * * *.

STATEMENT OF FACTS

The San Joaquin Fruit Company, a corporation (hereinafter referred to as the Fruit Company) was organized under the laws of California in 1906 (R. 20, 207), and carried on an agricultural business with headquarters at Tustin, California. (R. 205–206.)

In July, 1922, the respondent, the San Joaquin Fruit & Investment Company (hereinafter referred to as the Investment Company) was organized under the laws of California, with the same charter powers as the Fruit Company, together with certain additional powers, and the village of Tustin, California, was also designated as its principal place of business. (R. 226–229.) It acquired the operating properties of the Fruit Company in exchange for stock (R. 44), and thereafter caused the Fruit Company to distribute its assets and effect a dissolution (R. 209, 214). Formal decree of dissolution was entered by the Superior Court of Orange County, California, on December 26, 1922 (R. 214–223). C. E. Utt, who formerly was president and general manager of the Fruit Company during its entire existence, became president of respondent. (R. 163, 166.)

An examination of the Fruit Company's books was completed November 14, 1921, by a revenue agent, and a copy of the report was left with the Fruit Company. (R. 171.) Apparently another copy of this report was mailed to the Fruit Com-

pany on October 10, 1925. (R. 171–172.) A similar report covering the year 1921 was made December 8, 1925. (R. 193.) Deficiencies in the taxes of the Fruit Company for the years 1918 to 1921, inclusive, were determined. (R. 192–204.) On November 2, 1922, a thirty-day letter setting forth deficiencies for the years 1918, 1919, and 1920, was sent to the Fruit Company (R. 197), and on February 3, 1926, a similar notice covering the year 1921 was mailed to the Fruit Company (R. 192).

The tax was contested on its merits (R. 173), and negotiations were had with the Income Tax Unit (R. 180, 184, 231, 242, 246, 254, 258) with relation to the proposed assessments. Certain concessions and recomputations with respect to the proposed taxes were obtained. (R. 231, 242, 246, 254, 258.) The deficiencies for the years 1918, 1919, and 1920, as finally determined by the Commissioner, were asserted in sixty-day letters mailed to respondent under date of July 21, 1925, and July 27, 1925. (R. 30, 70, 229–231, 232–233.) A deficiency for the year 1921 was asserted in a sixty-day letter mailed to the Fruit Company, care of the Investment Company, under date of September 1, 1926. (R. 109, 171, 234–235.) On September 10, 1925, respondent filed petitions with the Board of Tax Appeals for redetermination of its tax liability for the years 1918, 1919, and 1920 (R. 18, 59), and on October 25, 1926, a similar petition was filed covering the year 1921 (R. 99). These petitions were filed under the caption "San Joaquin Fruit and Investment Co.

(Formerly San Joaquin Fruit Co.)." (R. 18, 59, 99.) Respondent described itself therein as the "taxpayer." (R. 18, 59, 100.) The petitions alleged that respondent was organized in 1906 (R. 20, 61, 101); that it acquired a lease upon real estate in that year (R. 21, 61, 101); that it gained title to the property in 1916 through the exercise of "the taxpayer's" option to purchase (R. 24, 64, 105); and that "the taxpayer is engaged in the cultivation and sale of citrus fruits and nuts" (R. 20, 61, 101) upon land which, during the years 1918 and 1919 "it" owned in fee simple (R. 61). The petitioner therein further alleged that in "its" original return the taxpayer claimed the entire value of said real estate as part of "its" invested capital (R. 24, 64–65, 105), and that "Upon the exercise of said option, and ever since, this taxpayer corporation had had, and is entitled to include in its invested capital" said value (R. 25, 65, 105–106). The petitions concluded with prayers by "the taxpayer" that the Board take jurisdiction and determine its liability. (R. 29, 69, 107.) The first two petitions were signed by "counsel for the taxpayer" and were verified by C. E. Utt, "President of San Joaquin Fruit and Investment Company, a successor to the San Joaquin Fruit Company." (R. 29, 69.) The respondent filed a fourth petition with the Board of Tax Appeals, which related to the tax liability of the Fruit Company for the year 1922. (R. 184–185.) That petition was filed under the caption "San Joaquin Fruit and Investment Company,

successor to San Joaquin Fruit Company, through change of name only."

It was verified by respondent's secretary, who alleged that respondent succeeded the San Joaquin Fruit Company, through change of name only, during the year 1922. (R. 187.) Petitioner joined issue upon said pleadings (R. 35–38, 74–77, 115–117), and thereafter the Board assumed jurisdiction of the cases involving taxes for the years 1918–1921, inclusive, and granted respondent a hearing upon the merits of its appeals. The case was placed upon the trial calendar and set for hearing at the request of respondent. Over objection of petitioner the case was heard as to part of the issues and continued as to other issues. Respondent's counsel announced that he appeared "for the taxpayer," and that the first issue presented related to " 'our' invested capital." (R. 162.) He introduced certain evidence with respect to the merits of the appeal, and then announced that respondent "closed its case with the exception of the special assessment issue." The case was continued to the reserve calendar of the Board to await a certain decision of the United States Supreme Court in a case then pending. (R. 164.) On April 4, 1928, respondent filed motions with the Board for leave to file amended petitions with respect to the years 1918, 1919, and 1920. (R. 38–39, 77–78.) The motions were granted without notice to or knowledge by petitioner. (R. 190–191.) Amended

petitions were thereafter filed, setting forth for the first time that the respondent and the Fruit Company were different corporate entities; that the respondent was not liable for the taxes in question, either as taxpayer or as "transferee." (R. 40–53, 78–91.) On October 10, 1928, a similar amended petition was filed with respect to the year 1921. (R. 117–130.)

On October 16, 1928, respondent's petitions again came on for hearing (R. 164), and respondent was permitted, over the objection of the petitioner, to introduce evidence to show that it was a different legal entity from the San Joaquin Fruit Company (R. 165–173).

In an opinion rendered June 29, 1929 (R. 143), the Board held that as to taxes for the years 1918, 1919, and 1920, the respondent was not liable therefor (R. 148–149) and accordingly entered an order of no deficiency (R. 151). As regards the year 1921 it held that it possessed no jurisdiction for the reason that the party taking the appeal was not the taxpayer against whom liability had been asserted (R. 150–151). The Commissioner of Internal Revenue filed a petition for review. (R. 154.)

While the Commissioner appears to have had waivers covering taxes for the years 1918 and 1919 (R. 169), such waivers were not introduced in evidence and therefore, so far as the record is concerned, it appearing that the statute of limitations had run against the assessment of taxes for those

years at the time the sixty-day letters were issued, the Commissioner raises no question concerning taxes for those years.

SPECIFICATION OF ERRORS

The Board of Tax Appeals erred (R. 157):

1. In not holding that the respondent was estopped to deny that it was the taxpayer and liable for the taxes for the years 1920 and 1921.

2. In deciding that the Commissioner did not determine deficiencies in taxes for the years 1920 and 1921 against the respondent as a transferee under the provisions of Section 280 of the Revenue Act of 1926.

SUMMARY OF ARGUMENT

The respondent, having appealed to the Board of Tax Appeals, and represented in such proceedings that it was the taxpayer, and having raised no issue relative to the sufficiency of the sixty-day letters sent to it with relation to taxes for the years 1920 and 1921 until after the time had expired within which determinations could be made against the Fruit Company, and the case having been tried in part upon the theory that the respondent was liable for the taxes in question, it was estopped to change its position and deny its liability. *Casey* v. *Galli,* 94 U. S. 673, 680; *Morgan* v. *Railroad Co.,* 96 U. S. 716, 720; *Liberty Baking Co.* v. *Heiner,* 34 F. (2d) 513, 516, affirmed (C. C. A. 3d), 37 F. (2d) 703, 704; *Trustees for Ohio & Big Sandy Coal Co.* v.

Commissioner (C. C. A. 4th), 43 F. (2d) 782; *Loewer Realty Co.* v. *Anderson* (C. C. A. 2d), 31 F. (2d) 268; *Lucas* v. *Hunt* (C. C. A. 5th), 45 F. (2d) 781; *Rockwood* v. *United States* (Ct. Cls.), 38 F. (2d) 707. The jurisdiction of the Board of Tax Appeals having been invoked, it had authority under Sections 283 (b) and 274 (e) of the Revenue Act of 1926, *supra,* to determine the respondent's tax liability, either as the original taxpayer or as transferee, and it became, and was, its duty to do so.

ARGUMENT

I

Respondent is estopped to assert that it is not the taxpayer

It is manifest from the record that subsequent to the merger of the Fruit Company into the Investment Company negotiations were carried on between the Bureau of Internal Revenue and someone representing the taxpayer and that by all concerned the Investment Company was considered and treated as the "taxpayer" and the real party in interest (R. 173, 180, 231, 242, 246, 254, 258), which it clearly was. The notices of deficiency were sent to the Investment Company as though it were the real taxpayer. (R. 229, 232.) On September 10, 1925, appeal was taken to the Board of Tax Appeals in the name of the Investment Company (R. 18, 59), and in the petitions filed therein it was alleged that the respondent was the "taxpayer" (R. 18, 59); that it was organized in

1906 and conducted the business from which the income was derived during the years in question (R. 20, 61); and that it had filed the original returns (R. 24, 64–65). No question was ever raised or even hinted concerning the respondent not being the real taxpayer until December, 1927 (R. 179, 184), more than two years after the petitions had been filed. At the time these petitions were filed the time within which new determinations could be made with respect to taxes for the years 1920 and 1921 had not yet expired. It is submitted that since the respondent held itself out as the taxpayer, accepted the notices of deficiencies, and thereafter affirmatively asserted that such notices had been properly directed to it as the taxpayer, and the Government having been lulled into a sense of security by such action, the respondent ought not, after the time for correcting any errors that might have been made had expired, be permitted to change its position and now assert that it is not the taxpayer. In *Casey* v. *Galli,* 94 U. S. 673, 680, the Supreme Court said:

> Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it.

And in *Morgan* v. *Railroad Co.*, 96 U. S. 716, 720, the same Court again said:

> He is not permitted to deny a state of things which by his culpable silence or misrepresentations he had led another to believe existed, and who has acted accordingly upon that belief.

This position was urged upon the Board of Tax Appeals (R. 165–173) and it is submitted that in rejecting the Commissioner's contention the Board was in error. Courts will not look with favor upon the respondent's position. See *Universal Steel Co.* v. *Commissioner* (C. C. A. 2d), decided February 9, 1931, reported in Prentice-Hall Fed. Tax Service (1931), Vol. I, p. 760; see also *Trustees for Ohio & Big Sandy Coal Co.* v. *Commissioner* (C. C. A. 4th), 43 F. (2d) 782, 784–785; *Liberty Baking Co.* v. *Heiner* (C. C. A. 3rd), 37 F. (2d) 703, 704; *Loewer Realty Co.* v. *Anderson* (C. C. A. (2nd), 31 F. (2d) 268; *Lucas* v. *Hunt* (C. C. A. 5th), 45 F. (2d) 781; *Rockwood* v. *United States* (Ct. Cls.), 38 F. (2d) 707.

II

Respondent was clearly liable as "transferee." Having acquired jurisdiction it was the duty of the Board to decide the respondent's tax liability, either as the original taxpayer or as "transferee"

The Board held that the deficiency letter which was sent to the respondent concerning taxes for the

year 1920 asserted a liability of the original taxpayer rather than that of the transferee. It held that the respondent was not the original taxpayer and it thereupon dismissed the petition without attempting to determine respondent's liability as a transferee. (R. 148–149.) As to the year 1921 it held that since the deficiency letter was addressed to the Fruit Company there was no deficiency asserted against the respondent and that since the respondent was not the taxpayer to whom the deficiency notice had been addressed, the Board was without jurisdiction to hear and decide the proceedings, and thereupon dismissed the petition as affecting that year. (R. 150–151.) The petitioner submits that the Board's ruling with respect to each of these two years was erroneous.

Section 274 (a) of the Revenue Act of 1924, *supra,* pursuant to which the notices in the present case were issued, as well as Section 274 (a) of the Revenue Act of 1926, *supra,* merely directs that where the Commissioner determines that there is a deficiency against the taxpayer the taxpayer "shall be notified of such deficiency by registered mail." It will be observed that this statute requires no special form of deficiency but merely requires that the taxpayer shall be notified thereof by mail. Section 280 of the Revenue Act of 1926, *supra,* governs proceedings against transferees but makes no provision whatever for the form of

notice.[1] It merely provides that the liability of the transferee "shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax" imposed against a normal taxpayer. The Board granted the hearing herein to respondent pursuant to the provisions of Section 283 (b) of the Revenue Act of 1926, *supra,* which in part provides:

> If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of Section 274 of the Revenue Act of 1924 * * * and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal.

Having so acquired jurisdiction, under the provisions of Section 274 (e) of the Revenue Act of 1926, *supra,* the Board had jurisdiction to determine the correct amount of the deficiency even though such amount should be greater than the de-

[1] The constitutionality of this section is now being raised in *Anna G. Phillips et al.* v. *Commissioner*, No. 455, now pending in the U. S. Supreme Court. Therein the Circuit Court of Appeals for the Second Circuit sustained its constitutionality (42 F. (2d) 177). A similiar position was taken by the Sixth Ciricuit in *Routzahn* v. *Tyroler*, 36 F. (2d) 208. Two District Courts have held to the contrary: *Owensboro Ditcher & Grader Co.* v. *Lucas* (W. D. Ky.), 18 F. (2d) 798; *Mid-Continent Petroleum Corp.* v. *Alexander* (W. D. Okla.), 35 F. (2d) 43. See also *Felland* v. *Wilkinson* (W. D. Wis.), 33 F. (2d) 961, 962.

ficiency stated in the deficiency notice. It is to be further observed that the Board of Tax Appeals was created as an independent agency in the executive branch of the Government. Section 1000 of the Revenue Act of 1926, c. 27, 44 Stat. 9.

Thus it will be seen that proceedings before the Board of Tax Appeals were never intended to require the strict formality of proceedings in courts of law. As to the deficiency notices no particular form is required. Any form that conveys actual notice is sufficient. It is manifest from the record herein that the respondent was liable for the taxes under consideration as transferee (*Penn* v. *United States* (C. C. A. 9th), 44 F. (2d) 321; *Phillips* v. *Commissioner* (C. C. A. 2nd), 42 F. (2d) 177), and that it fully appreciated this fact and treated the notices as though they were properly directed. There was no reason why such transferee could not waive any defect in the notices rather than raise an issue and cause the proceedings to be instituted anew. See *Tucker* v. *Alexander,* 275 U. S. 228. The case being properly before the Board, it was its duty to treat the action of the taxpayer as a waiver of any defects that may have existed in the notice, and proceed to administer substantial justice, which it clearly had the power to do.

As stated above the statutes merely direct that notice be sent to the "taxpayer." Sections 2 (a) (9) of the Revenue Acts of 1924 and 1926 define the term "taxpayer" as "any person subject to a tax

imposed by this Act," and the Supreme Court has held that the term is broad enough to include "transferee." *United States* v. *Updike,* 281 U. S. 489. It follows that notice to the respondent as "taxpayer" included notice to it as "transferee." It is therefore submitted that the Board of Tax Appeals was not justified in placing a narrower construction upon the statutory requirements as to notice.

This position is not in conflict with the general principal that statutes imposing taxes are to be strictly construed against the Government (*Gould* v. *Gould,* 245 U. S. 151), for we are asking the court to go no further than courts have gone in other cases. For example: It has been held that the term "associations" includes "Massachusetts trusts" (*Hecht* v. *Malley,* 265 U. S. 144, 145); the term "partnership" includes "an unincorporated joint-stock association" (*Burke-Waggoner Oil Ass'n.* v. *Hopkins,* 269 U. S. 110); and a number of persons acting through a common "attorney in fact" constitute an "association" (*Pickering* v. *Alyea-Nichols Co.* (C. C. A. 7th), 21 F. (2d) 501, 506-507).

It is submitted that the action of the Board of Tax Appeals in dismissing the petitions was arbitrary and not warranted in law and should therefore be reversed.

CONCLUSION

It is respectfully submitted that the action of the Board of Tax Appeals should be reversed and

the case remanded with instructions to the Board to redetermine respondent's tax liabilities in accordance with the computation of the Commissioner of Internal Revenue.

G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
JOHN H. MCEVERS,
Special Assistants to the Attorney General.
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No. 6346

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID BURNET, Commissioner of Internal Revenue,

Petitioner,

vs.

SAN JOAQUIN FRUIT & INVESTMENT COMPANY (a corporation),

Respondent.

BRIEF FOR RESPONDENT.

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May it please the Court:

With respect to the introductory matter in the first two pages of the brief for the petitioner, we observe that it is not strictly accurate for the petitioner to say that

> "the case involves income and profit taxes for the years 1918, 1919, 1920 and 1921 in the respective amounts of $66,147.93, $45,133.14, $22,872,09, and $21,867.40."

Originally, before the Board, that *was* what was "involved;" but upon the present review, less is involved, i. e., only taxes for two years, 1920 and 1921. This was, indeed, conceded by petitioner, when he

came to more particular statement, in the paragraph that commences at the bottom of his page 9, in the ending of which, at the top of page 10, he expressly concedes that

> "the Commissioner raises no question concerning taxes for those years [1918 and 1919]."

This is emphaized by his two specifications of error, which are limited to the years 1920 and 1921.

There were three cases docketed before the Board:

Board Docket No.	Year	Alleged deficiency
6988	(1918	$66,147.93
	(1919	45,133.14
6989	1920	22,872.09
20810	1921	21,867.40

Upon the present review no question is open under the Board's Docket No. 6988, for the years 1918 and 1919.

Now, when we turn to the petitioners'

"STATEMENT OF FACTS,"

and look for the particular matter wherein petitioner seeks to lay a predicate for his argument, we find *a fatal vice,* viz., he lays his predicate at his pages 6, 7 and 8, upon quotations selected here and there from the *original* petitions (and a partial hearing thereon) before the Board, but it seems plain, as to the year 1920, that the statement of the case should not be founded upon the original pleadings. Docket No. 6989 was heard upon an *amended* petition, filed upon mo-

tion and leave, T. 77-78; and thereupon the original pleading became *functus officio,* and disappeared from the case.

> "The amended complaint was filed under the order of the court. An amended complaint, which is complete in itself, and which does not refer to or adopt the original complaint as a part of it, entirely supersedes its predecessor, and becomes the sole statement of the cause of action. The original complaint becomes functus officio from the date of the filing of its successor."
>
> *U. S. v. Gentry,* 119 Fed. 70, 75 (C. C. A.-8).

> "The original pleadings * * * no longer constitute a part of the record proper, because they are superseded by the amended pleadings * * *; and merely copying such pleadings into the record or transcript is insufficient to make them part of of the record."
>
> 4 *C. J.* 118, col. 1.

Petitioner's statement of the case ignores the *findings* of the Board. Under the practice since the Revenue Act of 1928, the Board's findings are included in the "opinion," *Commissioner v. Crescent Leather Co.,* 40 F. (2d) 833, 834, col. 2, and *respondent here adopts the opinion and findings in the present case, as they appear in full at pages 144 to 151 of the transcript, as the true statement of the case.* Respondent says that the record here under review consists of: 1. The amended pleadings. 2. The statement of evidence. 3. The findings (as contained in the "opinion"). And we say, further, that in the review, the only power and duty of the Court is to

determine, in point of law, whether there is enough evidence to sustain the Board's action.

Avery v. Commissioner, 22 F. (2d) 6;

Royal Packing Co. v. Commissioner, 22 F. (2d) 536;

General Water Heater Corp. v. Commissioner, 42 F. (2d) 419.

I.

NONE OF THE ASSIGNMENTS OF ERROR RAISE ANY QUESTION FOR REVIEW.

There are six assignments, and they appear at pages 157 and 158 of the transcript. Assignments 1, 2 and 3 are most general and directed solely to the *decision,* i. e., in substance that the Board erred in deciding generally for the petitioner. None of the assignments is pointed to any specific *ruling;* nor is there any assignment of *insufficiency* of evidence, either generally or upon any separate issue; nor is there any assignment of insufficiency of the facts found to support the decision. In consequence, there is nothing in any assignment for this Court to consider:

> "Such assignments present nothing for the conideration of an appellate court. They bring up for review no ruling of the trial court. They do not show that at any point in the proceedings the court below committed error."
>
> *Hecht v. Alfaro,* 10 F. (2d) 464, 466 (C. C. A.-9).

A general assignment that there was error in rendering judgment one way or the other is too indefinite for consideration:

> *Arkansas Anthracite Coal & Land Co. v. Stokes*, 277 Fed. 624, 627.

There are many other authorities, and they all come from rule 11 (C. C. A.-9), common to all circuits, requiring an assignment to set out separately and *particularly* each error asserted.

Assignments 4 and 5 are similarly defective; and contain the additional defect of being pointed to a non-reviewable order made by the Board *after* its decision, equivalent to an order upon motion for new trial. The decision was "promulgated" on June 29, 1929 (T. 143). The motion and order to which assignments 4 and 5 are pointed, occurred in December, 1929 (T. 152-153). This Court has jurisdiction only "to review the *decisions* of the Board." Revenue Act 1926, sec. 1003 (b).

Assignment 6 is unworthy of discussion.

II.

THE FIRST SPECIFICATION OF ERROR DOES NOT RISE UPON ANY ASSIGNMENT, NOR WOULD AN AMENDED ASSIGNMENT RISE UPON ANY OBJECTION, RULING OR EXCEPTION AT THE HEARING.

The first specification is that the Board erred

> "In not holding that the respondent was estopped to deny that it was the taxpayer and liable for the taxes for the years 1920 and 1921."

The assignments of error will be searched in vain for any mention of an estoppel.

Now, when the estoppel argument of petitioner, and all of his authorities cited thereunder, are examined, it will be seen that he is asserting an estoppel *in pais*, or an equitable estoppel. There is not in the record any objection, ruling, or exception relating to such an estoppel, and in consequence there is nothing to form the basis of a specification of *error*, nor of an amended assignment of *error*. To state the matter more in detail:

(a) The Commissioner Did Not Effectively Plead Any Estoppel, Such as he Now Attempts to Specify and Argue.

An estoppel must be specially pleaded.

Mabury v. Louisville, etc., Co., 60 Fed. 645, 656;

New York Life Ins. Co. v. Rees, 19 F. (2d) 781, 785;

Grauf v. State Nat. Bk., 40 F. (2d) 2, 7.

The "answer to amended petition" in Docket No. 6989 (T. 97-99) is typical of all. The pertinent portion reads:

> "Denies generally and specifically each and every allegation in taxpayer's amended petition not hereinbefore expressly admitted, qualified or denied, and respondent further says that petitioner should not be heard to assert that it is not the taxpayer in this case, for the reason that the original petition was filed September 10, 1925, in which original petition the taxpayer asserted that it was formerly the San Joaquin Fruit & Investment Co. implying thereby that San Joaquin

Fruit & Investment Co. was merely a change in name. Respondent further says that heretofore, to-wit, on May 3, 1927, the taxpayer did engage in the trial on the merits of its case in so far as questions other than special assessment were concerned and that it should not therefore be now heard to assert that it is not the taxpayer involved in this appeal."

That is nothing more than an attempt to plead a quasi-estoppel, founded upon inconsistency of position within a judicial proceeding, as to which the rules are:

"A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, and has succeeded in maintaining that position, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. It is necessary, however, that the claim or position previously asserted or taken should have been successfully maintained, that it should be actualy inconsistent with the position presently taken, and that it should not have been taken through the fault of the adverse party. It is essential also that the party claiming the estoppel should have been misled by his opponent's conduct, that he should have acted in reliance thereon, and that his rights would be injuriously affected if his opponent were permitted to change his position. When no wrong is done a change in position should and will be allowed. The rule has no application where the knowledge or means of knowledge of both parties is equal, nor in case of mistake. Also the rule has no application to change of position with respect to matters of law."

21 *C. J.* 1223, § 227.

In consequence, the answer raised no issue, as a comparison of it with the foregoing passage from *Corpus Juris* discloses that there are at least four material elements missing from the plea, leaving it fatally defective. Moreover, none of the authorities cited in the Commissioner's brief have any bearing upon the type of estoppel abortively pleaded.

Indeed, the pleading is fatally insufficient to raise an issue of any species of estoppel whatever.

(b) The First Specification Must Fail, Because in Effect it is a Specification that a Particular Finding Was Not Made, Which Finding, if it Had Been Made, Could Not Have Affected the Result.

The rule is that "the only purpose of findings is to answer the questions put by the pleadings." *Rauer v. Bradbury,* 3 Cal. App. 256 (84 Pac. 1007, 1009). Suppose the Board had made a finding, reading: "The Board finds that all the allegations of paragraph 5 of the Commissioner's answer to the amended petition are true;" in what posture would that have put the case? Exactly as it is now, because material elements of an estoppel would be missing from the findings, precisely as they are missing from the abortive plea. In consequence, the first specification of error is of *harmless* error, for if the desired finding had been made the result could not change.

(c) The Commissioner Abandoned and Repudiated Before the Board the Claim of an Estoppel Such as is Now Attempted to be Specified and Argued.

This plainly appears in the following quotation from pages 188 and 189 of the transcript:

"Mr. Foley [attorney for the Commisioner]. Now I want to briefly make a few suggestions regarding my opponent's argument. Throughout his argument he referred to estoppel and he was very evidently laboring under the impression that the Commission was seeking to raise what is called an estoppel *in pais,* or equitable estoppel. That is one arising out of a misrepresentation by one party which is believed in and acted upon by the opposite party to his detriment, and therefore the person who believes in and acts upon this misrepresentation is entitled to have the Court say to the one who had deceived him, 'Having deceived this man before, you can't now tell us the truth.' That is an inequitable estoppel, and it is not the estoppel we rely upon at all. We rely upon the estoppel, which is akin to the familiar estoppel of the tenant to deny his landlord's title and in that estoppel there is no trace, —there is essentially no trace or no element whatever of deceit. If I go into possesion of a certain property as your tenant, I am estopped to deny your title whether I know you had one or not, and equally you are estopped to deny my tenancy whether you know you had title or not. Misrepresentation and deceit is entirely absent. Now, I want to cover that more fully in my brief, but I want to correct right now the misapprehension which I was afraid might be raised."

Having adopted that theory before the Board, the Commissioner is restricted to it before this Court, 3 *C. J.* 718, § 618.

III.

THE SECOND SPECIFICATION OF ERROR DOES NOT RISE UPON ANY ASSIGNMENT, NOR WOULD AN AMENDED ASSIGNMENT RISE UPON ANY OBJECTION, RULING OR EXCEPTION AT THE HEARING.

The second specification is that the Board erred

> "In deciding that the Commissioner did not determine deficiencies in taxes for the years 1920 and 1921 against the respondent as a transferee under the provisions of Section 280 of the Revenue Act of 1926."

No assignment supports the specification. Moreover, a "specification" should be *specific*. How did the Board err "in *deciding?*" Is it meant that the facts found are insufficient? Or that the evidence is insufficient to support some finding?

Where are we to look in the 262 pages of this transcript of record to find any objection, ruling or exception relating to the liability of a transferee? *At no stage of the hearing before the Board did the Commissioner claim that Investment Company was liable as a transferee of Fruit Company.*

It is fundamental that a Court sitting in *review* with no power *de novo,* cannot "review" a question not considered by the lower tribunal. *Landsberg v. S. F. & P. S. S. Co.,* 288 Fed. 560 (C. C. A.-9); *Bilboa v. U. S.,* 287 Fed. 125 (C. C. A.-9). As was said in the latter case:

> "This is an appellate tribunal, constituted and organized to review the rulings of subordinate tribunals, and ordinarily it will not consider an asisgnment of error, unless based on a ruling of the trial court and an exception duly noted (Fin-

ley v. U. S. 256 Fed. 845, 168 C. C. A. 191; Central R. Co. of N. J. v. Sharkey, 259 Fed. 144, 170 C. C. A. 212), for, as said by the Supreme Court of the United States in Robinson v. Belt, 187 U. S. 41, 23 Sup. Ct. 16, 47 L. Ed. 65, 'while it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their actions should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record.' "

Moreover, when a Court sits in statutory review of an order or decision of a branch of the executive in the course of a quasi-judicial hearing, the judicial review will not extend to any contention not specifically made before, and pressed upon, the executive:

> "The contention to which we have hitherto referred, that the arrangement made by the Terminal Company violates the commodity clause of the act to regulate commerce, is not necessary to be considered. There is nothing in the record showing that such a contention was pressed upon the Commission, considered by that body, or that the order rendered was in any respect based upon the commodity clause."
>
> *U. S. v. B. & O. R. Co.*, 231 U. S. 274, 292 (58 L. Ed. 218, 227);
>
> *Bernsten v. U. S.*, 41 F. (2d) 663 (C. C. A.-9).

> "The real difficulty presented by the record in the case at bar was the fact that the claim presented to the court for adjudication has never been presented to the Bureau."
>
> *Bernsten v. U. S.*, supra.

> "We think the question is not properly before us. It was not specifically raised on the record before the Board or either court below and, so far as appears, was not considered by any of them. * * * This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan v. United States,* 274 U. S. 195. There are specially cogent reasons why this rule should be adhered to when the question involves a practice of one of the great departments of the government."
>
> *Blair v. Oesterlein Co.,* 275 U. S. 220, 225.

Furthermore, even if the question had been presented in the evidence to the lower tribunal, the latter was without power to go out of its appointed sphere and undertake to hear or decide an issue not presented to it by either the deficiency notice or the pleadings:

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that upon

general principles, such a defect must avoid a judgment. It is impossible to concede that, because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises."

Reynolds v. Stockton, 140 U. S. 254, 268 (35 L. Ed. 464, 469);

Osage Oil & Ref'g. Co. v. Continental Oil Co., 34 F. (2d) 585, 588, col. 2, and cases there collected;

U. S. v. Goldstein, 271 Fed. 838, 845;

Federal Trade Comm. v. Gratz, 253 U. S. 421, 427 (64 L. Ed. 993, 996, col. 1).

Neither the deficiency letters, nor the pleadings, raised any issue of liability of a *transferee.*

IV.

EVEN IF THE FIRST SPECIFICATION WAS PROPERLY RAISED FROM THE RECORD, THE ARGUMENT THEREUNDER THAT "RESPONDENT IS ESTOPPED TO ASSERT THAT IT IS NOT THE TAXPAYER," IS WITHOUT MERIT.

(a) The Statute Raises the Jurisdiction of the Board Solely From the Commissioner's "Deficiency Letter," and Thereby Negatives all Other Modes of Acquisition of Jurisdiction; in Consequence, the Board Cannot Raise Jurisdiction From Estoppel.

The jurisdiction of the Board is initiated by the mailing of a "deficiency notice" by the Commissioner,

followed by an "appeal" therefrom to the Board. The statute prescribes that mode, and prescribes no other.

> "And this was the only way in which the property of the Company could be reached for taxation at all, for when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."
>
> *Raleigh, etc. Co. v. Reid,* 80 U. S. 269;
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> *Botany Worsted Mills v. U. S.,* 278 U. S. 282, 289;
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> 25 *C. J.* 220, note 17 (c);
>
> *Stradling v. Morgan,* 1 Plowden 199, 206 (75 English Reprint 305, 316-317);
>
> *Maney v. U. S.,* 278 U. S. 17.

> "The mode which the statute prescribed for a revision of the assessment is the measure of the power, and unless that mode is followed, any attempted revision will be nugatory. Where a statute prescribes the mode of acquiring jurisdiction, the mode must be complied with, or the proceedings will be a nullity. * * * A notice which, by its terms, is directed to A is ineffectual as a notice to B, even though it is delivered to B and he is thereby informed of its contents."
>
> *Williams v. Bergin,* 108 Cal. 166;
>
> *Mahaffey v. Pattel,* 266 Pac. 430 (Idaho).

With reference to a situation exactly in point, the Board said in *Carnation Milk Products Co.,* 20 B. T. A. 627, 634 (Acq. X-3 Int. Rev. Bull. 4901, p. 1):

> "With respect to the contention of the respondent that, while the two corporations may be considered separate legal entities, they are for all practical purposes the same, and that the peti-

> tioner is estopped from denying that it is the taxpayer, it must be remembered that the Board is a tribunal of limited jurisdiction, Aldine Club, 1 B. T. A. 710, and Consolidated Cos., 15 B. T. A. 645, and whatever jurisdiction it may have is definitely prescribed by the statute creating it and responsible for its continued existence. Therefore, the Board is powerless to apply rules of law, although applicable under other and different cirstances, which would tend to enlarge the jurisdiction of the Board or to substitute parties for those definitely prescribed by the statute."

In other words, even though principles of estoppel might be applied to waivers or other questions of *fact,* they cannot be applied so as to give the Board any *jurisdiction* which it would not have under the law.

In *Massachusetts Fire & Marine Ins. Co. v. Commissioner,* 42 F. (2d) 189 (C. C. A.-2), the Court held that it did not obtain jurisdiction of an appeal from the Tax Board by a *stipulation of both parties,* where the taxpayer was not a "resident" of the Second Circuit. This decision was followed in *Nash-Breyer Motor Co. v. Commissioner,* 42 F. (2d) 192, (writ of certiorari denied on January 5, 1931); and in *Grain King Mfg. Co. v. Commissioner,* C. C. A. 2nd Cir., February 2, 1931. See also *Spring Canyon Co. v. Commissioner,* 38 F. (2d) 764.

If jurisdiction cannot be obtained by written stipulation or consent, it is difficult to see how it could be obtained by estoppel. In the above cases, the Circuit Courts dismissed the appeals for lack of jurisdiction

on their own motions, despite the stipulations of the parties.

Likewise, in the present case the Board properly dismissed for lack of jurisdiction the appeal erroneously filed by the Investment Company on the deficiency notice for 1921 mailed to the Fruit Company. The record shows clearly that the Fruit Company was completely and finally dissolved by decree of the Superior Court, Orange County, California, on December 26, 1922, and that three named individuals were appointed trustees in liquidation (R. 214-223). Under California law, the Fruit Company was legally dead and could not thereafter act as a party in any litigation. In *Newhall v. Western Zinc Mining Co.*, 164 Cal. 380, 128 Pac. 1040, the Supreme Court of California said:

> "We can perceive no force to the argument that the appellant is estopped from complaining of the judgment. Herein it is said that as the directors are made trustees of the defendant corportion, and as the corportate answer was filed by one of these directors or trustees, it results that the stockholders' own trustee filed the answer in this case, and that this director or trustee having defended the action, and having admitted the corporate existence of the defendant, the stockholders are bound by this action. But to this it must be replied that the law authorizes the directors and not one of them, to act as trustees. It empowers them to sue and be sued but not to answer suits in the name of the defunct corporration. Braugier's answer was, therefore, not only without authority of law, but in direct violation of law."

See also *Sanborn Bros., Successors etc.,* 14 B. T. A. 1059, Acq. VIII-2 C. B. 46) in which the Board reviewed the California law and decisions on this point.

This principle was also recognized and applied by the Supreme Court in *Oklahoma Natural Gas Co. v. Oklahoma,* 273 U. S. 256, in which counsel for all parties joined in a motion to substitute a successor corporation as a party. The Supreme Court there said:

> "It is well settled that at common law and in the federal jurisdiction *a corporation which has been dissolved is as if it did not exist,* and the result of the dissolution cannot be distinguished from the death of a natural person in its effect. * * * To allow actions to continue would be to continue the existence of a corporation *pro hac vice.* But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigagating purposes it is necessary that there should be some statutory authority for the prolongation. *The matter is really not procedural or controlled by the rules of the court in which the litigation pends.* It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being." (Italics here and in other quotations, *infra,* are ours.)

For the 1921 taxes, the Commisioner issued a deficiency notice to the Fruit Company, which had previously dissolved. The Investment Company, a successor corporation, without any legal authority, filed a petition for the dissolved corporation. Obviously, under the decisions cited above, the Board

obtained no jurisdiction thereby over the dissolved corporation and no principle of estoppel could apply. Likewise, since the notice of deficiency was addressed to the Fruit Company, the Board could not obtain any jurisdiction over the Investment Company through the petition mistakenly filed by it on behalf of the dissolved corporation. It is not a question of equity or estoppel, but a question of statutory jurisdiction.

Accordingly, even if this Court should find that all the essential elements of estoppel were present, we respectfully submit that such finding could not confer any jurisdiction in the Board on the 1921 proceding.

(b) Even Though the Board Could Base Jurisdiction on Estoppel, Nevertheless the Familiar Elements of Estoppel are Not Present in the Record, as to Either of the Years in Dispute, 1920 and 1921.

1920—The deficiency notice for 1920 was addressed to the Investment Company, itself (T. 232). No mention was made therein of the Fruit Company. Had the Investment Company failed to file an appeal, the Commissioner would have been legally empowered to assess and collect the tax from it. Section 274 (c), Revenue Act of 1924. Accordingly, it acted on its own behalf and was in no sense a volunteer when it filed its petition with the Board.

This petition (T. 19-29) set forth clearly in its heading that the San Joaquin Fruit and Investment Company was "formerly San Joaquin Fruit Co." Likewise, the verification referred to the Investment Company as "a successor to the San Joaquin Fruit Com-

pany." There was clearly no misrepresentation in either of these statements. On the contrary, they expressly put the Commissioner on notice that the Investment Company was not the same corporation or taxpayer as the Fruit Company.

While the officers of the Investment Company knew that the Fruit Company had been legally dissolved, they did not know to what extent they were legally liable for its taxes in the action before the Board and the petition proceeded to defend against the deficiencies on the merits. Subsequently, however, the Commissioner issued, on December 29, 1927, a deficiency notice to the Investment Company as "transferee" of the Fruit Company for 1921 taxes, and this brought up squarely, for the first time, the legal questions now involved in this case (T. 180). Careful study by its attorneys then disclosed that the Investment Company was not legally liable for the 1920 taxes of the Fruit Company in the proceeding then pending before the Board, and by leave an *amended* petition was filed on April 4, 1928, setting forth all the facts in detail.

The record (pp. 173-185) shows clearly that the Board went deeply into the question of good faith of the Investment Company and its decision indicates that it was fully satisfied on that point. Accordingly, there was no element of intentional deception.

Furthermore, the dissolution of the Fruit Company was a matter of public record of which the Commissioner, like all other persons, was presumed to have knowledge. This dissolution occurred in December, 1922, and as late as 1925, a revenue agent examined

the books of the Fruit Company for the year 1921. Certainly, he was in a position clearly to determine the facts. The record shows that the Commissioner issued letters at various times indiscriminately to the Fruit Company and to the Investment Company.

The truth of the matter is that the real error occurred on July 27, 1925, when the Commissioner issued the deficiency letter to the "Investment Company" rather than to the "Fruit Company." *There is absolutely nothing in the record to show that this mistake was induced by any misrepresentation by the Investment Company. All that followed was a natural consequence of this initial error of the Commissioner.* The Investment Company very properly filed an appeal, as it was required to do under the law, to protect its rights.

It should be remembered that the burden of proof was upon the Commissioner to show that he "was permissibly ignorant of the truth of the matter." It was neither the duty nor within the power of the respondent to show when the Commissioner first acquired knowledge of the facts.

Furthermore, it was an essential element of the Commissioner's case that he show that he relied upon the alleged misrepresentations, and that he was misled thereby to his injury. The 1920 return was filed March 15, 1921 (T. 168), and the statutory period of limitations (five years) against the Fruit Company would not have expired before March 15, 1926. Section 277(a) (3) Revenue Act of 1926. Furthermore, if waivers were filed for that year, the period would

be extended accordingly. Section 278(c), Revenue Act of 1926. The statutory period for proceeding against the Investment Company as a transferee would not run until "one year after the expiration of the period of limitation for assessment against the taxpayer," which in no event would be earlier than March 15, 1927, and perhaps later. Certainly, it was incumbent upon the Commissioner to show positively that he did not acquire knowledge of the facts before the statute of limitations had run on transferee proceedings against the Investment Company, for otherwise he would not be injured by the alleged misrepresentations.

1921.—The deficiency notice for 1921 was addressed to the Fruit Company and the appeal was erroneously filed by a wholly different party, the Investment Company. Obviously, this did not give the Board any jurisdiction unless it obtained it by estoppel. The Commissioner has failed utterly to allege or prove that there were any intentional or negligent misrepresentations of material facts by the Investment Company but rather the evidence shows a mere mistake of law on the part of the Commissioner.

Furthermore, the Commissioner has not shown that he acted on the alleged misrepresentations to his injury. On the contrary, the record shows clearly that he was not injured at all, for the reason that *the statute of limitations had run on additional taxes for the Fruit Company for 1921, long before the deficiency notice in question was mailed.* The 1921 return was filed May 12, 1922 (T. 168). In the absence of any valid waivers, the statute of limitations (four years)

would run on May 12, 1926. Section 277(a) (2), Revenue Act of 1926. The deficiency notice was not mailed until September 1, 1926, and the appeal was not filed until October 25, 1926. Accordingly, in the absence of valid waivers, the deficiency in question was barred by limitations nearly six months before the petition was filed in which the misrepresentations are alleged to have occurred. As the Commissioner's rights had been already extinguished (Section 1106(a), Revenue Act of 1926), it is difficult to see how he can claim that he was injured in any way by the petition filed by the Investment Company.

While the Commissioner may contend that there were valid waivers outstanding and accordingly that the deficiency was not barred before October 25, 1926, the record speaks for itself. Not a single waiver was introduced in evidence, although the Government attorney was put on notice and was given an opportunity to offer any waivers he might have (T. 169). Since *resulting injury* is an essential element in an estoppel, and the burden was on the Commissioner to prove every element, it follows that his case must fall—for the record shows that the injury, if any, occurred long before the act in question and could not possibly have resulted therefrom.

It seems obvious that the proper procedure for the Commissioner to have followed was the issuance of a *transferee* notice to the Investment Company, rather than a *deficiency* notice to the dissolved taxpayer. The Commissioner evidently reached the same conclusion, for on December 29, 1927, he issued a transferee notice to the Investment Company for the 1921

taxes here in question (T. 234). It is not to be assumed that the Commissioner issued said transferee notice without proper authority or that such proceeding will not be effective to collect the taxes here in question. Certainly, the burden is upon the Commissioner to show why he should be allowed to recover in this action, under some theory of estoppel, taxes which he presumably will recover in another proceeding already pending against the same corporation against which the alleged estoppel is asserted. The Commissioner's positions in these two proceedings are absolutely inconsistent with his present contention that he has been fatally injured. The very contrary appears from the record.

Accordingly, the Commissioner has failed to show affirmatively in the record either that the injury, if any, did not occur before the alleged misrepresentations, or that he has not at the present time a full and proper remedy in the transferee proceeding pending before the Board.

The cases cited by the petitioner all relate to general questions of *estoppel in pais,* presenting the usual problems, and in none of them was any attempt made to acquire *jurisdiction* by estoppel. For convenience of the Court, we are summarizing them briefly below:

Casey v. Galli, 94 U. S 673. Stockholder of a bankrupt corporation was not allowed to show, in suit on stockholder's liability, that the corporation was not legally a national bank, where it had acted as such, with the assent of more than two-thirds of its stockholders. No question of jurisdiction.

Morgan v. Railroad Co., 96 U. S. 716. Suit against railroad company for possession of land was met with defense that the plaintiff was estopped to deny that public dedication of the property had been made. No question of jurisdiction.

Universal Steel Co. v. Commissioner (C. C. A. 2nd), January 9, 1931. No question of estoppel was presented.

Trustees for Ohio & Big Sandy Coal Co. v. Commissioner, 43 F. (2d) 782. Question of validity of waiver not personally signed by the Commissioner. The Court merely stated that the taxpayer could not urge the bar of the statute which it had expressly agreed to waive. No question of jurisdiction.

Liberty Baking Co. v. Heiner, 37 F. (2d) 703; *Loewer Realty Co. v. Anderson,* 31 F. (2d) 268. Both of these cases held merely that a waiver was not invalid for lack of consideration where properly executed. Note that the Supreme Court, in *U. S. v. Stange,* January 5, 1931, held that consideration was not necessary to the validity of consents, even though executed after the statute had run, without resting its decision upon any principle of estoppel.

Lucas v. Hunt, 45 F. (2d) 781. In a transferee proceeding against the former president and liquidator of a dissolved corporation, the Court held that he was estopped to deny the validity of a waiver which he himself had executed and filed for the dissolved corporation. No question of jurisdiction.

Rockwood v. U. S., 38 F. (2d) 107—Estoppel asserted by Court against plaintiff, trustee of dissolved

corporation, who had filed corporation return and claims for refund asserting that it was still in existence, to show that it had been previously dissolved. The Court pointed out, however, that the trustee in any event would have been subject to the same corporate taxes as an "association." No question of jurisdiction. Compare *Rockwood v. U. S.*, 39 F. (2d) 984, in which estoppel was denied for a different year.

Examination of the above cases will show that they involved materially different situations from that here presented. In none of them was there any question of jurisdiction and in at least four there was not even a true case of estoppel.

It is interesting to review, on the other hand, the numerous cases in which the Board has considered its lack of jurisdiction over appeals filed by unauthorized transferees or successors to a dissolved corporation. The principal decisions are as follows:

Bisso Ferry Co., 8 B. T. A. 1104;
Canghey-Jassman Co., 8 B. T. A. 201;
Bond, Inc., 12 B. T. A. 339;
Weis & Lesh Mfg. Co., 13 B. T. A. 144;
American Arch Co., 13 B. T. A. 552;
Sanborn Bros., Successors, 14 B. T. A. 1059 (Acq. VIII-2 C. B. 46);
S. Hirsch Distilling Co., 14 B. T. A. 1073 (Acq. VIII-2 C. B. 23);
Engineers Oil Co., 14 B. T. T. 1148 (Acq. VIII-2 C. B. 16);
Consolidated Textile Corp., 16 B. T. A. 178;
Union Plate & Wire Co., 17 B. T. A. 1229 (Acq. IX-1 C. B. 55);

Gideon-Anderson Co., 18 B. T. A. 329;
Van Cleave Trust, 18 B. T. A. 486 (Acq. IX-1 C. B. 55);
Carnation Milk Products Co., 20 B. T. A. 627 (Acq. X-3-4901).

In all of the above cases the question related to the jurisdiction of the Board where an appeal was filed by some unauthorized transferee or successor of a dissolved company, and in all of them the Board denied jurisdiction. Some of these cases were dismissed by the Board on its own motion. In several, the dismissal was *upon motion of the Commissioner.* See, for example, *American Arch Co.,* supra, and *Bond, Inc.,* supra. In others, the dismissal was made over the protests of the transferee. See, for example, *Bisso Ferry Co.,* supra. In only two of these cases did the Commissioner take an appeal to a Circuit Court of Appeals, and both of these appeals have been dismissed recently *upon motion of the Government.* See *Commissioner v. Gideon-Anderson Co.,* C. C. A. 8th Cir., October 17, 1930; *Commissioner v. Consolidated Textile Corporation,* C. C. A., 4th Cir., October 21, 1930. So far as we know, none of the other cases have been appealed except the appeal in the instant proceeding.

We respectfully submit that the Board either does, or does not, acquire jurisdiction in this type of case, and that it cannot be left to the option or election of the Commissioner. Certainly, it would be a travesty on justice to allow one party to actions of this kind to determine for the Board whether it can assume jurisdiction.

As will be noted from an examination of these cases, the Commissioner has taken absolutely inconsistent positions, but the Board and the Courts, *in all decided cases,* have consistently denied jurisdiction under these circumstances. We respectfully submit that jurisdiction is a question of law, not dependent upon the consent, waiver, estoppel, or election of one or both parties.

As was said by Judge Rudkin in *Flynn v. Haas Bros.,* 20 F. (20) 510, "every estoppel must be mutual." Since the Commissioner has taken and maintained the position in cases of this kind that the Board has no jurisdiction, he should not be permitted in the present case to maintain the contrary position. Even if the question were doubtful, such doubts should be resolved in favor of the taxpayer, and the findings of the Board should not be reversed.

V.

EVEN IF THE SECOND SPECIFICATION WAS PROPERLY RAISED FROM THE RECORD, THE ARGUMENT THEREUNDER, IN EFFECT THAT JURISDICTION ARISING UPON A LETTER ASSERTING A DEFICIENCY AGAINST A TAXPAYER MAY BE METAMORPHOSED INTO JURISDICTION OVER A TRANSFEREE, IS WITHOUT MERIT.

(a) There is a Clear Distinction Between a Letter Asserting a Deficiency Against a Taxpayer, and a Letter Asserting a Liability Against a Transferee.

This is illustrated in the decision of the Board in *Edward Michael et al.,* Docket 31,832, March 10, 1931, wherein the Commissioner's letter asserted a liability upon the part of the addressees as *transferees* for

income taxes due from a corporation for the year 1922. *Inter alia,* the Board said:

> "The argument of the petitioner is that the notices mailed November 19, 1926, asserting liability under section 280 of the act are 'notices of a deficiency' and are 'mailed to a taxpayer.' Unless both of these contentions are sound, the petitioner's argument must fail.
>
> "Section 280 distinguishes between 'the liability at law or in equity, or a transferee of property of a taxpayer' and 'a deficiency in a tax.' It provides that the former shall 'be assessed, collected and paid in the same manner' as the latter. This serves to make the procedure similar but the language clearly differentiates between a liability as transferee and a deficiency. Had Congress intended the construction for which petitioner contends it would have been much simpler to have modified the definition of a deficiency to include such a liability. Instead we find it drawing a distinction.
>
> "Nor do we believe that one who becomes liable to pay the tax of another because of a liability at law or in equity is the 'taxpayer' as that word is used in the portions of the statute quoted above. The section deals with the liability of a transferee of property of a taxpayer to pay the tax imposed upon the taxpayer. There is a distinction drawn in this section between a taxpayer and one liable at law or in equity to pay his tax. The act, in section 2 (a) (9) defines a taxpayer as one 'subject to a tax imposed by this Act.' The act imposes no tax upon the transferee of assets of a taxpayer. It creates no new liability. It merely provides a new method by which the liability

> which arises at law or in equity may be determined and enforced. Henry Cappillini, 14 B. T. A. 1269. Conference Report on the Revenue Bill of 1926 (69th Congress, 1st Session, Rept. No. 356)."

It will be noted that in the case just cited the Commissioner was arguing the exact opposite of his present contention and successfully maintained that there is a fundamental distinction in the law between a notice to a person as a transferee or fiduciary, and a notice to the same person as a taxpayer. Not only was the Board's decision sound, but it is impossible to reconcile the position which the Commissioner now takes in this case with the position which he established in the case just cited.

It should be kept in mind that Section 280, Revenue Act of 1926, contains drastic provisions which may and often do work injustice and gross hardship. It substitutes summary proceedings against one person for the collection of taxes of another, in place of the usual suits in equity, and deprives the transferee of many defenses which it would have in a Court of equity. Grave doubt exists as to its constitutionality. Certainly, the operation of such an unusual and arbitrary provision should not be extended by implication or inference. If any reasonable doubt exists as to the jurisdiction of the Board in the present situation, that doubt should be resolved against the Government and in favor of the taxpayer. See *United States v. Updike,* 281 U. S. 489; *Gould v. Gould,* 245 U. S. 151; *U. S. v. Merriam,* 263 U. S. 179; *Smietanka v. First*

Trust & Savings Bank, 257 U. S. 602; *U. S. v. Field*, 255 U. S. 257.

This principle was clearly stated by this Court in *Lynch v. Union Trust Company of San Francisco*, 164 Fed. 161, as follows:

> "In the construction of statutes imposing taxes *and especially burdens of special or unusual nature*, in cases of doubt or ambiguity, every intendment is to be taken against the taxing power."

(b) As No Transferee Letter Was Mailed for Either of the Years 1920 and 1921, the Commissioner's Argument Under His Second Specification is Unsound, as the Board Could Not Hear and Decide a Transferee Liability in the Absence of a Transferee Letter as a Foundation of Jurisdiction.

The petitioner apparently places his reliance upon the provisions of Section 283 (b) Revenue Act of 1926. This sub-section of the Act relates solely to appeals filed before the enactment of the 1926 Act. Accordingly, it is applicable only to the proceeding for the year 1920, because the appeal to the Board for the year 1921 was not taken until after the 1926 Act became effective. It follows that the petitioner has failed utterly to show affirmatively that the Board had jurisdiction of the 1921 appeal. As a matter of fact, the absurdity of the petitioner's position is established by his action in asserting a deficiency against the respondent during the latter part of 1927, as transferee of the Fruit Company (T. 234). Such transferee proceeding is now awaiting trial before the Board. How, then, can petitioner now assert that the Board should have retained jurisdiction and deter-

mined the respondent's liability as transferee, when the very issue that he now raises is joined in a proceeding before the same Board against the same petitioner, covering the same year and in the same amount? If the respondent is liable as transferee for the year 1921 such liability can and will be determined under the formal transferee proceedings now pending before the Board, which determination will give the petitioner the same hearing that he seeks in this case.

Considering now the petitioner's contention that the respondent is liable as a transferee for the year 1920, it is pertinent to present a summary of the provisions of the 1926 Act that relate to appeals pending at the time of its passage. The purpose of the enactment of Section 283 (b) of such Act becomes apparent when it is read in conjunction with related sections.

Section 274 provided for the mailing of *deficiency* notices and the filing of petitions with the Board in the case of deficiencies in taxes imposed by the 1926 Act. Section 283 is entitled "Taxes Under Prior Acts" and covers the jurisdiction of the Board as to deficiencies in taxes imposed by prior Acts. Subdivision (a) refers to deficiencies proposed after the effective date of the 1926 Act, not previously assessed. Subdivision (b) confirms in the Board any jurisdiction it might have obtained under appeals filed prior to the enactment of the 1926 Act; it does not purport to give the Board jurisdiction to redetermine the tax in any case not properly before it under the 1924 Act.

Let us now consider our appeal from the 1920 deficiency notice, in the light of these provisions. Be-

fore the 1926 Act became effective, the Investment Company had filed a petition with the Board, covering the year 1920, under the provisions of Section 274, Revenue Act of 1924, in response to a deficiency letter addressed to the *Investment Company* itself, by the Commissioner. Section 274 of the Revenue Act of 1924 was applicable solely to *taxpayers* and not to *transferees,* for there were no transferee provisions in that Act.

Section 283 (b) of the Revenue Act of 1927 affirmed and retained in the Board such jurisdiction as it has obtained under appeals filed theretofore under the Revenue Act of 1924. Accordingly, the Board very properly retained jurisdiction of the appeal filed by the respondent on the 1920 *deficiency* notice, and, under the facts, made the only determination which was possible for it to make; that there was no deficiency to the respondent for the taxable year 1920.

However, the petitioner now contends for the first time that even though the respondent owed no *deficiency* as a taxpayer for the year 1920, nevertheless the Board should have determined its liability, if any, as a *transferee* under the provisions of Section 280 of the Revenue Act of 1926. This provision was inserted in the 1926 Act by Congress to permit the Commissioner to assert against transferees and fiduciaries, liabilities for taxes or otherwise, which previously he could assert only *in court proceedings.*

As was said in Senate Report No. 52, 69th Cong. 1st Sess., January 16, 1926, at page 30:

> "Under existing law proceedings for the enforcement of liabilities such as those heretofore

> discussed are *solely by court proceedings.* No proceeding before the Board for the redetermination of a deficiency and for the ultimate enforcement by assessment and distraint may be had."

The transferee proceedings provided for in Section 280 were clearly intended to be only prospective in their operation. For example, subdivision (e) provided expressly:

> "This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary *pending at the time of the enactment of this Act.*"

Obviously, Section 283(b) was not intended retroactively to give the Board jurisdiction under Section 280 which expressly did not become operative until February 26, 1926.

Likewise, Section 274(e) of the Revenue Act of 1926 merely authorized the Board to determine the taxes under the proceedings and issues properly presented to it, and cannot properly be construed as retroactively giving the Board jurisdiction over the respondent as a transferee under a petition appealing from a deficiency notice.

It should be borne in mind that this is not merely a formal or procedural question, but one pertaining to the jurisdiction of a statutory tribunal of strictly limited jurisdiction. Strict compliance with the statutory provisions is necessary to give jurisdiction to the Board and validity to its determinations. This is not a case of a purely formal defect which has been waived. For the year 1920, the Commissioner pro-

posed deficiencies against the Investment Company as a taxpayer. If the notices for this year had been addressed to the "Investment Company" as transferee, the Board would have been without jurisdiction to act; but upon the appeal from a deficiency notice, the Board obtained a limited jurisdiction and properly determined the only issue before it—that no deficiencies were due by the Investment Company as a taxpayer.

With respect to the year 1921, the situation is equally clear. The deficiency notice was not mailed and the petition was not filed until after the 1926 Act became effective. The petition was filed by the wrong party, so the Board obtained no jurisdiction at all. Accordingly, there is no merit in the Commissioner's contention that Section 274(c) is applicable. As a matter of fact, the Commissioner never claimed before the Board that the Investment Company should be held liable as a transferee under Docket No. 20,801. Accordingly, there can be no question of a *waiver* of the alleged "defect" of notice, as in *Tucker v. Alexander*, 275 U. S. 228. At the hearing before the Board, the respondent herein made no waivers and contended strongly for the conclusions which the Board, itself, finally made.

The respondent apparently contends that, having obtained jurisdiction over a party as a *taxpayer*, the Board should in the same proceeding assert its liability as a *transferee*. We respectfully submit that there is no statutory warrant for this contention. Section 280 of the Revenue Act of 1926, covers all the provisions in the law giving the Commissioner au-

thority to proceed against the transferee or fiduciary in the same manner as he would proceed against taxpayers. Throughout this section a very careful distinction is made by Congress between "transferees" and "fiduciaries" on the one hand, and "taxpayers" on the other. Such distinction appears in Subdivisions (a) (1) and (2); and (b) (1), (2) and (3); (c), (d) and (e). If the term "taxpayer" were interpreted in these sections as including transferees and fiduciaries, then obviously the intention of Congress would be thwarted and there would be hopeless confusion as to statutes of limitation and other rights of the parties. A casual reading of Section 280 will convince the Court of this fact.

The distinction between the statutory "taxpayer," primarily liable for the tax, and the "transferee," liable only secondarily or in equity, is clearly recognized in Section 602 Revenue Act of 1928, which amended the 1926 Act by adding Section 912, under the heading "Transferee Proceedings," as follows:

> "In proceedings before the Board the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a *transferee* of property of a *taxpayer,* but not to show that the taxpayer was liable for the tax."

Furthermore, this distinction has been recognized clearly and consistently in the practice of the Treasury Department. Where the Commissioner is proceeding against the "taxpayer," the notice is on one form, referring only to Section 274; where he proceeds against a "transferee or fiduciary," the notice refers specifically to Section 280. In the instant case,

for example, the Commissioner issued a notice for the 1921 deficiency, on September 1, 1926, (Petitioner's Exhibit No. 11) to the Fruit Company as the "taxpayer," which is now before this Court. On December 29, 1927, he issued a notice to the Investment Company as transferee, (Petitioner's Exhibit No. 12) the first paragraph of which reads as follows:

> "As provided in Section 280 of the Revenue Act of 1926, there is proposed for assessment against you the amount of $21,867.40 constituting *your liability as transferee* of the assets of the San Joaquin Fruit Company, formerly of Tustin, California, for unpaid income tax in the above amount *due from the above-named taxpayer* for the year 1921 as shown by the attached statement plus any accrued penalty and interest."

Subdivision (d) of Section 280 provides expressly for the mailing of notices "to the transferee or fiduciary." In the present case the notice for the 1921 tax—the only notice mailed under the Revenue Act of 1926—was not addressed to the Investment Company but the Fruit Company. Obviously, no notice was given that the Commissioner was proceeding under the transferee or fiduciary provisions of Section 280. The notice for the 1920 tax was addressed to the Investment Company as a taxpayer at a time when there was no authority in the law for such notices to be sent to transferees, and it seems quite obvious that such notice could not in any way be taken as initiating transferee proceedings under the provisions of a revenue act not then in existence.

This is by no means a novel question, but on the contrary, the same situation has arisen in numerous

cases before the Board. In *Carnation Milk Products,* 20 B. T. A. 627, the deficiency notice was issued on July 6, 1926, to a dissolved corporation, and a petition was filed by another corporation which described itself as "the successor to, or transferee of the assets, of" the old company. The Board held that it did not thereby acquire jurisdiction to determine the petitioner's liability, if any, as a *transferee.* It is of the utmost significance that the Commissioner has announced his acquiescence in this decision. See X-3 Int. Rev. Bull. 4901, page 1.

To the same effect were the decisions of the Board in

Engineers Oil Co., 14 B. T. A. 1148 (Acq. VIII-2 C. B. 16);
Bond, Inc., 12 B. T. A. 339;
Weis & Lesh Mfg. Co., 13 B. T. A. 144;
Bisso Ferry Co., 8 B. T. A. 1104;
American Arch Co., 13 B. T. A. 552;
Consolidated Textile Corporation, 16 B. T. A. 178;
Gideon-Anderson Co., 18 B. T. A. 329;
Sanborn Brothers, successors, etc., 14 B. T. A. 1059 (Acq. VIII-1 C. B. 46).

In the cases of *Bond, Inc.* and *American Arch Co.,* the dismissal for lack of jurisdiction was *upon motion of the Commissioner.* In the *Consolidated Textile Corporation,* an appeal was dismissed by the Circuit Court of Appeals, 4th Circuit, on October 21, 1930, *upon motion of the Government.* Likewise, in the *Gideon-Anderson Co.,* an appeal was dismissed by the Circuit Court of Appeals, 8th Circuit, on October 17,

1930, *upon motion of the Government.* None of the other cases were appealed, so all the above-cited decisions represent authoritative precedents upon the exact question here presented, as an analysis of their facts will show.

To upset this line of decisions in the present case would result in inequality in the application of the law, and uncertainty and confusion as to the jurisdiction of the Board in numerous cases. Certainly a statutory tribunal of limited jurisdiction should not be permitted to acquire jurisdiction purely by waiver or unauthorized appearances by volunteers; and in all cases of doubt, the Board's own decision, that the facts do not justify its assumption of jurisdiction, should be approved by the Appellate Court.

Accordingly, the decision of the Board should be affirmed: as to the years 1918 and 1919, because no error is assigned or specified as to those years; and as to the years 1920 and 1921, because no questions rise upon the record, and in any event the decision was right.

Dated, San Francisco,
March 28, 1931.

Respectfully submitted,
JOSEPH D. PEELER,
GEORGE M. NAUS,
Attorneys for Respondent.

J. R. SHERROD,
Of Counsel.

No. 6852

United States
Circuit Court of Appeals
For the Ninth Circuit.

6

WARD DANIELS,

Claimant and Appellant,

TRIPLE GAS SCREW MOTOR BOAT RETHALULEW, Official No. 227860,

Respondent,

vs.

UNITED STATES OF AMERICA,

Libelant and Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

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United States Attorney;

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Federal Building, Los Angeles, California.

CITATION

THE UNITED STATES OF AMERICA, SS:

The President of the United States to the United States of America, Greeting:

To the United States of America:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court of the United States in and for the Southern District of California, and filed in the Clerk's office of said court on the 1st day of November, 1930 in a cause wherein the Triple Gas Screw Motor Boat "Rethalulew," Official No. 227860, and Ward Daniels, are appellants and you appellee, to show cause, if any, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John R. Hazel, Judge of the District Court of the United States in and for the Southern District of California this 1 day of November, 1930, and of the Independence of the United States, the one hundred and fifty-fifth.

John R. Hazel
District Judge.

Attest:

R. S. Zimmerman, Clerk
By Edmund L. Smith, Deputy Clerk.

Service of the within citation and receipt of a copy is hereby admitted this 3d day of November, 1930.

Samuel W. McNabb
United States Attorney
Attorney for Appellee.

Louis J. Somers
Assistant United States Attorney.

[Endorsed]: Filed Nov 3 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

UNITED STATES OF AMERICA, Libelant, vs. TRIPLE GAS SCREW MOTOR BOAT RETHALULEW, Official No. 227860. Respondent.	No. 3487-M LIBEL.

The United States of America by Samuel W. McNabb, United States Attorney for the Southern District of California, and Emmett E. Doherty, Assistant United States Attorney for said District, respectfully shows:

I.

That the triple gas screw motor boat RETHALULEW, Official No. 227860, is anchored or moored in the harbor

of Los Angeles, California, and within the jurisdiction of this court:

II.

That on or about the 30th day of July, 1928, James H. Curwin of Los Angeles, California, executed "Managing Owner's Oath" on Department of Commerce, Bureau of Navigation form, as required by the provisions of Sec. 4321 R. S., 46 U. S. C. A. 263; that the said J. H. Curwin stated under said oath that he was the sole owner of the triple screw motor boat RETHALULEW.

III.

That on or about the 30th day of July, 1928, John McCluskey executed master's oath for license of yacht under twenty (20) tons upon Department of Commerce form required, pursuant to the provisions of Section 4320 R. S., 46 U. S. C. A. 262; that therein the said John McCluskey averred under oath that the gas screw vessel RETHALULEW would be used as a pleasure yacht and that the said vessel would not be used for any trade or business whereby the revenue of the United States may be defrauded.

IV.

That the said managing owner's oath executed by the said J. H. Curwin and the said master's oath executed by the said John McCluskey were filed at the Customs House for the port of Los Angeles, California; that thereafter the Collector of Customs for the Port of Los Angeles, Lewis Schwaebe, issued for the said motor boat RETHALULEW a LICENSE OF YACHT UNDER TWENTY TONS in conformity to Chapter 2 Title XLVIII, "Regulation of Commerce and Navigation" of the Revised Statutes of the United States and "An Act to amend Section 4214 and 4218 of the Revised Statutes relating to

yachts," approved August 20th, 1912; that the said license provided among other things that the said John McCluskey, the master of said RETHALULEW has sworn "that this vessel" shall be "used and employed exclusively as a PLEASURE VESSEL. ****** shall not, while this license continues in force, transport merchandise **** or engage in any unlawful trade nor in any way violate the revenue laws of the United States and shall comply with the laws in all other respects.

V.

That the said RETHALULEW upon divers and sundry occasions proceeded from her berth in the Port of Los Angeles upon the high seas West of the coast of California, to-wit: during the months of August, September and October, 1928, and during such period of time transported from one to two loads of alcohol weekly,—a total of approximately six thousand (6,000) cases from the motor schooner PRZEMYSL; that at the time the said six thousand cases of intoxicating liquor, to-wit: alcohol were transferred from the motor schooner PRZEMYSL to the motor boat RETHALULEW, the said motor schooner PRZEMYSL was hovering off the coast of California on the high seas; that on or about September 30th, 1928, the said RETHALULEW was loaded upon divers occasions with approximately four thousand (4,000) cases of alcohol which were transported by the said RETHALULEW from the PRZEMYSL to the British steamship L'AQUILA; that at the time said cargo of the PRZEMYSL was transferred to the L'AQUILA, the said L'AQUILA hovered at a distance of approximately two hundred yards from the PRZEMYSL.

VI.

That the said six thousand (6000) cases of intoxicating liquor loaded on board the RETHALULEW from the PRZEMYSL during the months of August, September and October, 1928, as hereinabove described were never landed in the United States at a Customs House.

VII.

That the managing owner's oath executed by the said J. H. Curwin for the purpose of obtaining a license for the said RETHALULEW was false in that the said RETHALULEW was to be used for smuggling intoxicating liquors into the United States, which liquors were to be loaded upon the RETHALULEW at sea from mother ships hovering about the coast of California and smuggled and clandestinely introduced into the United States without entering the said intoxicating liquors at a United States Customs Office at the port of entry in the United States; that the said oath of the said J. H. Curwin was false wherein he alleged that he was the owner of the vessel; that the said J. H. Curwin did not, in fact, own the said vessel and that at all times hereinafter mentioned the said J. H. Curwin in truth and in fact knew that he was not the owner of the vessel and it was further alleged that the said J. H. Curwin at all times herein mentioned knew that the said Motor Boat RETHALULEW was not to be used as a pleasure yacht, but as a speed boat for smuggling intoxicating liquor into the United States, in violation of law;

That the oath of said John McCluskey in executing master's oath for a license of said motor boat RETHALULEW was false, wherein the said affiant alleged under oath that the said motor boat RETHALULEW was to

be used exclusively as a pleasure yacht and not ply in any trade or business wherein the revenue laws of the United States would be defrauded; that at the time the said John McCluskey executed said oath he then and there well knew in truth and fact that the said motor boat RETHALULEW was to be used for smuggling intoxicating liquor into the United States in violation of law;

That the said false oaths of the owner J. H. Curwin and the master John McCluskey, described in this paragraph seven of this information of libel are in violation of Section 4143 R. S. and Title 46 U. S. C. A., Sec. 21;

That the said LICENSE OF YACHT UNDER TWENTY TONS for the said RETHALULEW was issued as aforesaid upon the representation of the owner hereinabove named that the said vessel would be employed or used exclusively as a pleasure vessel; that the said vessel would not transport merchandise; that the said vessel would not engage in any unlawful trade and that the said vessel would not violate the Revenue Laws of the United States, and upon the further representation that the said vessel would comply with all of the laws of the United States in all other respects;

That the said Motor Boat RETHALULEW was registered as a pleasure yacht and engaged in trade other than that for which she was licensed. Title 46 C. C. A. 325; 4377 R. S.

VIII.

That the said Rethalulew was duly registered by the Collector of Customs and the said vessel proceeded on foreign voyage without first giving up her enrollment or license to the Collector of Customs of the District comprehending the port from which she was about to proceed

on such voyage during the months of August, September, and October 1928, as described in Paragraph V of this information of libel; in violation of Section 4377—R. S. Title 46 U. S. C. A. 278.

IX.

That at the time the said LICENSE OF YACHT UNDER TWENTY TONS was issued by the Collector of Customs for the RETHALULEW, the said Master John McCluskey and the said owner J. H. Curwin then and there well knew that the said license of yacht under twenty tons was fraudulently obtained, wherein the said master and owner knew that the RETHALULEW was destined to engage in the trade of smuggling intoxicating liquors into the United States in violation of law and that the acts of the said owner J. H. Curwin and the said Master John McCluskey in knowingly and fraudulently obtaining the said LICENSE OF YACHT UNDER TWENTY TONS for the RETHALULEW was in violation of Section 4189 R. S., Title 46 U. S. C. A. 60.

X.

That all of the acts alleged in this information of libel were committed during the time when said LICENSE OF YACHT UNDER TWENTY TONS was in full force and effect.

WHEREFORE, the libelant prays that the said RETHALULEW be forfeited to the United States and that the usual process issue against the said vessel, her motors, tackle, apparel, etc. and that all persons having an interest in said vessel or claim thereto, be cited to appear and show cause why the vessel should not be forfeited for the violations set forth in this information of libel and

for such further and other judgment and order as to the Court may seem proper in the premises.

SAMUEL W. McNABB,
United States Attorney,
Emmett E. Doherty
EMMETT E. DOHERTY,
Assistant United States Attorney.

[Endorsed]: Filed Apr 22 1929 R. S. Zimmerman, Clerk, By Edmund L. Smith Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

ORDER FOR PROCESS TO ISSUE.

WHEREAS a Libel has been filed in the above entitled case on behalf of the United States of America by Samuel W. McNabb United States Attorney for the Southern District of California,

IT IS NOW ORDERED that a monition for the attachment of the said MOTOR BOAT RETHALULEW, Official No. 227869, described in said libel and set forth in the title of this cause be issued and directed to the United States Marshal of the Southern District of California, commanding the said United States Marshal to take into his possession and custody the said MOTOR BOAT RETHALULEW, Official No. 227860,

AND IT IS FURTHER ORDERED that the said Marshal do admonish and cite any and all persons whomsoever having or claiming to have any title or interest whatsoever in or to said MOTOR BOAT RETHALULEW, Official No. 227860, to appear in the District Court of the United States, in and for the Southern District of

California, Central Division, in the courtroom of the Honorable Judge of the said court in the Federal Building in the City of Los Angeles on the return day of said monition, then and there to show cause, if any there be, why the prayer of said libel should not be granted.

AND IT IS FURTHER ORDERED that Monday, the 13th day of May A. D., 1929, at the hour of 10 o'clock A. M., be and is hereby fixed as the return day of said monition, and that the said Marshal shall make the return of said monition on said day and at said hour in said court-room.

AND IT IS FURTHER ORDERED that the United States Marshal for the Southern District of California shall cause public notice to be given of the seizure and of the taking into his possession of the property described in said libel under and by virtue of the said process herein ordered to be issued, and of the time and place assigned for the hearing of said cause, said notice to be given by publication in the Los Angeles News a newspaper of general circulation printed, published and circulated in the City of Los Angeles within the Central Division of the Southern District of California, the said publication to be for at least once a week during the period of two weeks in said newspaper and the first publication thereof to be not less than fourteen days prior to that assigned herein as the return day for said monition.

Dated this 22nd day of April, 1929.

Paul J. McCormick,
United States District Judge.

[Endorsed]: Filed Apr 22 1929 R. S. Zimmerman, Clerk, By Edmund L. Smith Deputy Clerk.

United States of America, }
Southern District of California, } ss.

The President of the United States of America:

To the Marshal of the United States, for the Southern District of California, Greeting:

Whereas, a libel *in rem* hath been filed in the District Court of the United States for the Southern District of California, on the 22nd day of April, in the year [Seal] of our Lord one thousand nine hundred and twenty-nine, by the United States of America, Libellant, vs. TRIPLE GAS SCREW MOTOR BOAT RETHALULEW, Official No. 227860, by Samuel W. McNabb, United States Attorney for the Southern District of California, in a cause of condemnation, seizure and sale, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said MOTOR BOAT RETHALULEW may be cited in general and special to answer the premises and all proceedings being had that the said Motor Boat Rethalulew may for the causes in the said Libel mentioned, be seized, condemned and sold to satisfy the demands of the Libellant.

You are therefore hereby Commanded to attach the said Motor Boat Rethalulew and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held in and for the Southern District

of California, Central Division, at the Courtroom of the Honorable PAUL J. McCORMICK, Judge of the said United States District Court, in the Federal Building, in the City of Los Angeles, State of California, on the 13th day of May, A. D. 1929, at 10 o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness, the Honorable Paul J. McCormick Judge of said Court, at the City of Los Angeles, in the Southern District of California, this 22d day of April, in the year of our Lord one thousand nine hundred and twenty-nine, and of our Independence the one hundred and fifty-third.

R. S. ZIMMERMAN, Clerk.

Edmund L. Smith Deputy Clerk.

United States Attorney.

Proctor for Libellant.

In obedience to the within monition, I attached the Boat therein described, on the 23rd day of April, 1929, and have given due notice to all persons claiming the same, that this Court will, on the 13th day of May, 1929 (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

Dated April 23rd, 1929

A. C. Sittel, U. S. Marshal.

By M. J. Finn, Deputy.

[Endorsed]: Filed Apr 25 1929 R. S. Zimmerman, Clerk, By M. L. Gaines, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

AMENDMENT TO THE LIBEL OF INFORMATION.

Comes now the UNITED STATES OF AMERICA by Samuel W. McNabb, United States Attorney for the Southern District of California, and Emmett E. Doherty, Assistant United States Attorney for said District of California, Proctors for the Libelant, who upon leave of Court amend paragraph I of the Libel on file herein as follows:

I.

That the TRIPLE GAS SCREW MOTOR BOAT "RETHALULEW," Official No. 227860, was seized on or about the 20th day of April, 1929, by the United States Coast Guard in the harbor of Los Angeles, California, for violation of the revenue laws of the United States and that the said vessel on the date of filing this Libel of Information is in the custody of the United States Coast Guard, moored in the harbor of Los Angeles, California, and within the jurisdiction of this Court.

DATED: This 3rd day of June, 1929.

SAMUEL W. McNABB,
United States Attorney,
Emmett E Doherty
EMMETT E. DOHERTY,
Assistant United States Attorney
Proctors for Libelant.

[Endorsed]: Received copy of within this 3 day of June, 1929 Otto Christensen—J. W. Carby attorney for Respondent Filed Jun 4—1929 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

CLAIM

Comes now Ward Daniels and says that he is the owner of the Triple Gas Screw Motor Boat RETHALULEW, respondent in the above entitled action, her tackle, apparel, and furniture, and intervening for his interest in the said property, appears before this Honorable Court and claims the said property, and states that he is the true and sole owner thereof, and that no other person or persons are the owners thereof; that he acquired said property by purchase, for a valuable consideration, on to-wit, the 5th day of December, 1928, from the then lawful and registered owner of said property.

WHEREFORE, the said claimant prays that this Honorable Court will be pleased to decree the restitution of the aforesaid property to him, and for such other relief as may be proper in the premises.

Ward Daniels
Claimant

Otto Christensen
Attorney for Claimant

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

WARD DANIELS, being first duly sworn, on oath says:

That he is the claimant in the foregoing and above entitled action; that he has read the within Claim and knows the contents thereof; and that the same is true of his own knowledge except as to the matters and things therein

stated on his information or belief, and that as to those matters and things he believes it to be true.

Ward Daniels

SUBSCRIBED and sworn to before me this 25th day of April, 1929.

[Seal] Louise Kingsley

Notary Public in and for said County and State

[Endorsed]: Filed May 1 1929 R. S. Zimmerman, Clerk, By M. L. Gaines Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

INTERVENING PETITION AND ANSWER TO LIBEL.

Comes now Ward Daniels and files this his petition of intervention and answer to the libel of information in the above entitled cause of action, and as grounds therefor, excepts, admits, denies and alleges as follows:

I.

That he is the owner of "One Gas Screw Motor Boat Rethalulew, Official No. 227860, her engine, furniture, apparel, etc." named in the above cause of action, and says that he became the owner of said boat by purchase, for a valuable consideration, on to-wit, the 5th day of December, 1928, from the then lawful and registered owner of said property, James H. Curwin. That said transfer was made by bill of sale and recorded with the Collector of Customs at San Pedro, California, within the jurisdiction of this court, pursuant to law, on to-wit, the 5th day of December, 1928. That he paid the sum of Nine Thousand Five Hundred Forty-two Dollars ($9542.00) as the

purchase price of said boat to the said James H. Curwin. Your claimant and intervenor further says that at the time he purchased said boat he was not advised and/or had he any information that the said boat had violated any laws, and/or that the boat was guilty of any wrongdoing, and/or that the said boat had violated any of the conditions of its "enrollment or license," and/or had committed any of the acts alleged in said libel, and/or that the enrolled owner, J. H. Curwin, and the enrolled master, John McCluskey had made or executed any false oath "for the purpose of obtaining a license for the said Rethalulew."

That your claimant and intervenor further alleges on information and belief the fact to be that the said J. H. Curwin was the builder and original owner of said boat and was the true owner, as well as the registered owner, of said boat on the 5th day of December, 1928.

II.

This claimant and intervenor has made inquiry concerning the matters and things alleged in paragraphs V and VI of said libel, and basing his denial upon such information so received, denies each and every, all and singular, the allegations in said paragraphs; this claimant and intervenor, upon such information and belief, alleges the fact to be that said boat was not used and did not transport alcohol during the months of August, September and October, 1928, or at any other time transport alcohol from the motor schooner "PRZEMYSL," or any other boat and/or transfer alcohol from said motor schooner "PRZEMYSL" to the steamship "L'AQUILA"; that said boat was never used or employed in any trade at any time whatsoever.

III.

This claimant and intervenor has made inquiry regarding certain matters and things alleged in paragraphs VII, VIII and IX of said libel, and basing his denial upon such information so received, denies each and every, all and singular, the allegations in said paragraphs. This claimant and intervenor, upon information and belief, denies that the said J. H. Curwin, for the purpose of obtaining a license for the said "RETHALULEW," exceuted a false managing owner's oath and/or that it was intended by the said J. H. Curwin at the time of making application for said license and/or obtaining said license, to use said "RETHALULEW" for smuggling intoxicating liquors into the United States, and/or engage in the transportation of intoxicating liquors upon the high seas, and/or to use said boat to introduce liquors into the United States without entering the said intoxicating liquors at the United States Customs Office at the port of entry into the United States; denies that "said oath" of the said J. H. Curwin was false wherein he alleged that he was the owner of the said vessel, but alleges the fact to be that the said J. H. Curwin was the owner of said vessel at the time of the making of said managing owner's oath for the purpose of obtaining a license for the said "RETHALULEW"; denies that at all times mentioned in said libel the said J. H. Curwin knew that the said motor boat "RETHALULEW" "was not to be used as a pleasure yacht, but as a speed boat for smuggling intoxicating liquors into the United States in violation of law."

Denies that the said John McCluskey executed a false master's oath for a license of said motor boat "RETHALULEW" and/or that the said John McCluskey at the

time of the execution of said oath knew that the said motor boat "RETHALULEW" was to be used for smuggling intoxicating liquors into the United States in violation of law; denies that the said boat "RETHALULEW" was subject to condemnation, forfeiture and sale by reason of the alleged violation of Sections 4143 R. S. and 4377 R. S.; denies that said "RETHALULEW" was engaged in any trade other than that for which she was licensed, in violation of Section 4377 R. S.

Denies that the said J. H. Curwin and said John McCluskey, at the time the "said license of yacht under twenty tons was issued by the Collector of Customs for the RETHALULEW", then and there knew that the said license was fraudulently obtained and/or either of them knew that the said "RETHALULEW" was destined to engage "in the trade" of smuggling intoxicating liquors into the United States in violation of law, and/or that the said John McCluskey and the said J. H. Curwin knowingly and fraudulently obtained the said license for the "RETHALULEW" in violation of Section 4189 R. S.

IV.

Your claimant and intervenor, answering paragraph X of said libel, denies that the acts alleged in said information of libel were committed during the time "when said license of yacht under twenty tons" was in full force and effect.

V.

AS A SEPARATE AND DISTINCT DEFENSE, your claimant and intervenor says that said boat "RETHALULEW" did not, nor any part of it, become forfeited in the manner and form as in the libel of infor-

mation in that behalf alleged for any of the causes therein alleged.

VI.

AND AS A FURTHER, SEPARATE AND DISTINCT DEFENSE, your claimant and intervenor excepts to the libel filed herein because this Court has no jurisdiction over the "RETHALULEW" or the subject matter of this proceeding.

VII.

Your claimant and intervenor as a further separate and distinct defense, excepts to the libel filed herein because the said libel does not allege facts sufficient to constitute a cause of forfeiture under Sections 4143 R. S., 4377 R. S. or 4189 R. S.

VIII.

Your claimant and intervenor as a further separate and distinct defense, says that said boat "RETHALULEW" at the time of the filing of the information of libel herein, and the seizure of said boat, was not operating under the license obtained under the oaths of J. H. Curwin as managing owner, and John McCluskey as master; that said license so issued on the oaths of the said J. H. Curwin and John McCluskey had expired and was of no further force or effect at the time of the filing of the libel information herein, and the seizure of said boat. That since the 5th day of December, 1928, when your intervenor and claimant became the owner of said boat "RETHALULEW", the said boat has been used and employed exclusively as a pleasure vessel.

WHEREFORE, the said claimant and intervenor prays as follows:

That said Triple Gas Screw Motor Boat "RETHALULEW," her engine, furniture, apparel, etc. be appraised by the Court in pursuance of Section 938 of the Revised Statutes of the United States, and that the said vessel be delivered to him, the said Ward Daniels, upon his filing a bond executed by himself and a surety Company, to be approved by the Court, providing for the payment to the United States of a sum equal to the sum at which the said vessel is appraised, should the United States prevail in its cause of action and obtain a decree of forfeiture.

That the Court decree that it has no jurisdiction over the "RETHALULEW," or the subject matter of this action, and dismiss the said action, and that the "RETHALULEW" be returned to your claimant and intervenor, and that he recover his costs of suit incurred herein;

That the Court sustain each and all exceptions above mentioned and dismiss the said action; and for such other and further relief as to the Court may seem proper and just.

Ward Daniels
Claimant and Intervenor, Ward Daniels

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

WARD DANIELS, being first duly sworn on oath, says:

That he is the claimant and intervenor in the foregoing and above entitled action; that he has read the foregoing intervening petition and answer, and knows the contents thereof, and says that the same is true of his own knowl-

edge, except as to the matters and things therein stated on information or belief, and that as to those matters and things so alleged on information and belief he believes it to be true.

Ward Daniels

SUBSCRIBED and sworn to before me this 30th day of April, 1929.

[Seal] Louise Kingsley

Notary Public in and for said County and State.

[Endorsed]: Received copy 5/1/29 H. G. Balter Asst U S Attorney. Filed May 1 1929 R. S. Zimmerman, Clerk, By M. L. Gaines Deputy Clerk

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[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED by and between Samuel W. McNabb, United States Attorney for the Southern District of California, and Emmett E. Doherty, Assistant United States Attorney for said District, Proctors for the Libelant, and Otto Christensen, Proctor for Respondent, that an order be entered by the Court referring the trial of this cause to David B. Head, Commissioner, and that the said Commissioner shall have authority to take testimony, to continue the trial from day to day, to make findings of fact and make a report therein.

IT IS FURTHER STIPULATED that the Commissioner's fee for hearing this cause shall be paid by the respondent.

DATED: February 3rd, 1930.

SAMUEL W. McNABB,
United States Attorney.
Emmett E. Doherty
EMMETT E. DOHERTY,
Assistant United States Attorney,
Proctors for Libelant.

Otto Christensen
OTTO CHRISTENSEN,
Proctor for Respondent.

IT IS SO ORDERED this 3rd of January, 1930.

Paul J. McCormick
United States District Judge.

[Endorsed]: Filed Feb 3 1930 R. S. Zimmerman, Clerk By M. L. Gaines, Deputy Clerk

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[Title of Court and Cause.]

SECOND AMENDMENT TO LIBEL. FIRST ADDITIONAL CAUSE OF ACTION

Libelant amends the original libel filed herein by adding, thereto, the following additional cause of action.

In an action for condemnation and forfeiture for violating the laws of the United States, the libelant alleges and respectfully shows to the Court as follows:

Libelant herein repeats and realleges each and every allegation contained in articles 1 to 10, inclusive, of the original libel filed herein, April 22, 1929, and articles 1

and 2, inclusive, of the amendment to the libel of information filed, herein, on the 4th day of June, 1929, as fully and with the same force and effect as if the same were here repeated, realleged and set forth at length.

And further alleges.

That upon divers and many occasions during the months of July, August and September, 1928, and particularly on or about September 30, 1928, the Triple Gas Screw Motor Boat "Rethaluleu" was laden and unladen with cargo and merchandise without a special license or permit therefor issued by the Collector of Customs, which said cargo and merchandise were of the value of $500.00 and more, in violation of c 356, Title 4 of the Act of September 21, 1922; Section 453, 42 Stat. 955; Section 266, Title 19, U. S. Code.

SECOND ADDITIONAL CAUSE OF ACTION.

Libelant amends the original libel filed herein by adding, thereto, the following cause of action.

In an action for condemnation and forfeiture for violating the laws of the United States, the libelant alleges and respectfully shows to the Court as follows:

Libelant herein repeats and realleges each and every allegation contained in articles 1 to 10, inclusive, of the original libel filed, herein, April 22, 1929, and articles 1 and 2, inclusive, of the amendment to the libel of information filed, herein, on the 4th day of June, 1929, and the first additional cause of action stated in article 1 of amendment of this date.

And further alleges.

That, on many occasions during the months of July, August and September, 1928, and, particularly, on or about September 30, 1928, the Triple Gas Screw Motor

Boat "Rethaluleu," official No. 227860, was operated in violation of her license by carrying merchandise for pay, which operation constituted a violation of Revised Statutes 4214; Title 46, Section 103 U. S. Code.

FOR A THIRD ADDITIONAL CAUSE OF ACTION

Libelant amends its original libel filed, herein, by adding thereto, the following additional cause of action.

In an action for condemnation and forfeiture for violating the laws of the United States, the libelant alleges and respectfully shows to the Court as follows:

Libelant herein repeats and realleges each and every allegation contained in articles 1 to 10, inclusive, of the original libel filed, herein, and articles 1 and 2, inclusive, of the amendment filed June 4, 1929, and the first and second cause of action stated in articles 1 and 2 of the amendment of this date, as fully and with the same force and effect as if the same were here repeated, realleged and set forth at length.

And further alleges that upon divers and many occasions during the months of July, August and September, 1928, the Triple Gas Screw Vessel "Rethaluleu," Official No. 227860, arrived from a foreign port or place, with dutiable merchandise on board, and failed to report to the Customs officer of the United States, at the port or place of her arrival, and failed to deliver to said officer a manifest of all dutiable articles brought from said foreign country or place, in violation of her license and in violation of Revised Statutes 4218, Title 46, Section 106, U. S. Code.

WHEREFORE, libelant prays that a decree be entered, herein, as prayed for in the original libel, herein, filed on

April 22, 1929, and for such other and further relief as in law and justice it may be entitled to receive.

Samuel W. McNabb
SAMUEL W. McNABB,
UNITED STATES ATTORNEY.

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney.

Upon the application of Libelant, and good cause appearing, therefore, it is ordered that the above amendments to the libel, herein, be filed.

Paul J. McCormick
UNITED STATES DISTRICT JUDGE.

Dated this 15th day of May, 1930.

[Endorsed]: Received copy of the within amendment to libel, this 15 day of May, 1930. F. A. Sievers Solicitor for Claimant. Otto Christensen Filed May 16 1930 R. S. Zimmerman, Clerk, By M. L. Gaines, Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

REPORTER'S TRANSCRIPT OF TESTIMONY AND PROCEEDINGS OF HEARING BEFORE HON. DAVID B. HEAD, COMMISSIONER.

LOS ANGELES, CALIFORNIA, TUESDAY, MAY 27, 1930. 10 A. M.

THE COMMISSIONER: This is the case of the United States vs. Triple Gas Screw Motor Boat "Rethaluleu", No. 3487-M.

MR. SOMERS: Ready.

THE COMMISSIONER: Ready Mr. Christensen?

MR. CHRISTENSEN: Yes, we are ready.

MR. SOMERS: Your Honor has the pleadings before you?

THE COMMISSIONER: Yes.

MR. SOMERS: For the convenience of the Court and counsel I have a copy of the statutes in question and present them to the Court. (Handing papers to the Court.)

MR. CHRISTENSEN: I haven't examined the second amendment to the libel.

THE COMMISSIONER: There are two amendments to the liable, I understand.

MR. SOMERS: That is true, your Honor.

MR. CHRISTENSEN: As to the second amendment —I may as well say as to the first, I haven't a copy of that—I want to reserve any objection that I may have to this at this time. They were simply filed. I haven't examined them, and therefore I want to reserve an objection at this time, and if I have any I can state it later on, so as not to interfere with the taking of testimony at this time.

MR. SOMERS: I was under the impression that counsel had been served with copies of the amendments. May I look at the files? The amendment of May 16, Mr. Christensen, appears to have been served upon you.

MR. CHRISTENSEN: That is the second amendment to the libel?

MR. SOMERS: Yes.

MR. SOMERS:

MR. CHRISTENSEN: I have a copy of that. / The first amendment avers only the place and date of seizure and location of the vessel at the time of seizing. I would like to direct your Honor's attention to a typographical misprint in the description of one of the sections of the statute, 4377, the second place it occurs in the original libel it should read 4337.

(Testimony of Carl O. Metcalf)

THE COMMISSIONER: What page is that?

MR. SOMERS: It is at the top of page 5 of the libel.

THE COMMISSIONER: It should read what?

MR. SOMERS: 4337. We ask to make that correction.

THE COMMISSIONER: Any objection to correcting this by interlineation?

MR. CHRISTENSEN: No, your Honor.

THE COMMISSIONER: I have amended the original by striking out 4377 and interlining 4337.

MR. CHRISTENSEN: It may be understood that the answer heretofore filed may stand as answer to the libel as amended by the two amendments, subject to any objections that we have to the right to file these amendments.

THE COMMISSIONER: Yes, I presume there is no objection to considering this second amendment to the libel as being denied?

MR. SOMERS: It may be deemed denied, your Honor. Call Carl O. Metcalf.

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CARL O. METCALF,

called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SOMERS:

Q Please state your name.

A Carl O. Metcalf.

Q And your occupation?

(Testimony of Carl O. Metcalf)

A Clerk and acting deputy collector of customs now in charge of marine documents, San Pedro.

Q How long have you been so occupied?

A About 10 years.

Q Do you have in your charge the official records relating to the customs matters of the United States, at the Port of Los Angeles?

A Yes, sir.

Q I show you a document certified as of May 22, 1930, purporting to be the license of the Triple Gas Screw Motor Boat "Rethaluleu". Did you make that certification?

A I did.

Q Is it a true copy of the original?

A It is.

MR. SOMERS: I ask that this be received in evidence as Libelant's Exhibit 1, your Honor.

THE COMMISSIONER: Any objection?

MR. CHRISTENSEN: No objection.

Q Have you in your possession the owner's oath and application for a license dated July 30, 1928?

A The oath is dated July 27.

MR. SOMERS: I stand corrected.

A The document is dated July 30.

Q And this appears on what page of your book?

A 43.

Q And the master's oath?

A The owner's oath and master's oath.

Q On what page?

A 43.

(Testimony of Carl O. Metcalf)

Q Will you read that, the owner's oath first and then the master's oath.

(The book is examined by Mr. Christensen.)

MR. CHRISTENSEN: Objected to as no proper foundation laid for the introduction of said alleged document. There is no authentication of the names appearing on said alleged document.

THE COMMISSIONER: You had better further identify it.

Q BY MR. SOMERS: At the time that the ownership oath was taken, did a party appear before you purporting to be J. H. Curwin and in your presence raise his hand and swear to the truth of the statements made above his signature and sign his name?

A He did.

Q And the name appearing at the foot of the document herein, J. H. Curwin, is the name he signed on that occasion?

A Yes.

MR. SOMERS: I submit that the matter has been sufficiently identified, your Honor.

MR. CHRISTENSEN: Objected to upon the same ground as heretofore stated and upon the further ground that there is no connection made between the alleged purported person who said he was J. H. Curwin, and the actual owner of the boat.

THE COMMISSIONER: No, it doesn't appear you have identified this person as the registered owner of the boat otherwise than by a name.

Q BY THE COMMISSIONER: Do you have any knowledge on that subject?

(Testimony of Carl O. Metcalf)

A We have on file in the Customs House—I haven't it here with us—certificate of the builder that this vessel was built for J. H. Curwin; built by Fellows & Stewart in the year 1928.

Q But you haven't any knowledge that the J. H. Curwin given as the owner is the J. H. Curwin who signed that?

A I have not.

Q BY MR. SOMERS: Is the book, the oath which I have shown you, an official record of the Customs Department made in the regular course and prescribed course of business?

A Yes, sir, it is.

Q And the proceedings whereby this man swore that he was the owner of the boat, was taken in the regular course of business?

A Yes, sir.

Q And the same set of facts appears, does it not, as to the entries made on page 43, wherein John McCluskey's name appears as master of the Gas Screw Yacht "Rethaluleu"?

A Yes, sir.

MR. CHRISTENSEN: My objection, if the Court please, goes to both the questions with reference to the owner as well as the master of the boat.

THE COMMISSIONER: All right. I think the identification is sufficient to admit it prima facie.

Q BY MR. SOMERS: Have you certified copies of the owner's oath?

A No.

(Testimony of Carl O. Metcalf)

MR. SOMERS: I move, your Honor, that the owner's oath and master's oath, the owner's oath appearing in the book on page 42 and the master's oath appearing on page 43, be received in evidence, and that they may be withdrawn upon the substitution of photostatic copies.

MR. CHRISTENSEN: Objected to on the ground as heretofore stated.

THE COMMISSIONER: Overruled; admitted.

MR. SOMERS: Will your Honor kindly give them a number.

THE COMMISSIONER: Offer it as two exhibits?

MR. SOMERS: Yes.

THE COMMISSIONER: I don't want to mark this book.

MR. SOMERS: They may be referred to as to the record as 2 and 3.

THE COMMISSIONER: Owner's oath is 2 and master's oath is 3.

MR. CHRISTENSEN: May an exception be noted as to the ruling, your Honor?

THE COMMISSIONER: Yes.

(Libellant's Exhibits 2 and 3 in evidence.)

Q BY MR. SOMERS: Have you recently made a search of the official records of the Customs House to ascertain the dates of entry or the dates of clearance of the gas screw motor boat "Rethaluleu"?

A Yes, sir.

Q Did you find, within the period of July 30 to October 15, as to whether or not the gas screw motor boat "Rethaluleu" entered or cleared the Port of Los Angeles?

(Testimony of Carl O. Metcalf)

A What year?

Q 1928.

A No record whatever of the vessel ever having entered the harbor, and being a yacht, it is not required to clear.

Q In the event that a vessel of the class described in the license of the "Rethaluleu" carried cargo or merchandise she would have been compelled under the law to clear at the Customs House?

MR. CHRISTENSEN: Just a moment.

Q Would she have been?

MR. CHRISTENSEN: That is objected to, if the Court please, as asking for a conclusion of the witness, and particularly a legal conclusion.

THE COMMISSIONER: We will take judicial notice of whatever the laws and regulations are. We will have to find out what they are.

MR. SOMERS: The question is withdrawn, your Honor.

Q Have you made a search of the records of the Customs House to ascertain whether there is registered more than one boat under the name "Rethaluleu"?

A Yes, sir.

Q Is there more than one boat so registered?

A This is the only one.

Q I hand you a document certified under date of May 22, 1930, purporting to license the "Rethaluleu" and Ward Daniels, of Pasadena, 43 South Marengo Avenue, and ask you if that is a true copy of the original in your possession?

A Yes, sir, it is.

(Testimony of Carl O. Metcalf)

MR. SOMERS: I move the reception in evidence of the document last identified by the witness and ask it be properly numbered.

MR. CHRISTENSEN: No objection.

(Libellant's Exhibit No. 4 in evidence.)

Q BY MR. SOMERS: Have you in your possession the original second owner's oath purporting to be signed by Ward Daniels?

A I have.

MR. CHRISTENSEN: No objection.

MR. SOMERS: I move that the owner's oath appearing on the book on page 97, and the master's oath appearing on page 98 of License oaths, April 10, 1928 to August 9, 1929, of the records of the Customs House be received in evidence.

MR. CHRISTENSEN: No objection.

MR. SOMERS: They may be withdrawn upon the filing of photostatic copies?

MR. CHRISTENSEN: I have no objection to the owner's oath, if the Court please, but I do make the same objection I made heretofore to the Master's oath on the ground heretofore stated, because I don't know anything about that.

THE COMMISSIONER: Objection will be overruled. The owner's oath will be received as Libellant's Exhibit 5 and the Master's oath as Libellant's Exhibit 6.

MR. CHRISTENSEN: Exception.

(Libellant's Exhibit 5 and 6 in evidence.)

MR. SOMERS: You may inquire.

(Testimony of Carl O. Metcalf)

CROSS EXAMINATION

BY MR. CHRISTENSEN:

Q Mr. Metcalf, the "Rethaluelu" was first licensed on July 30, 1930?

A Yes, sir—1928.

Q I mean 1928, that is right. And the first proceeding is what, in connection with the licensing of a new boat?

A The first proceeding is to admeasure the vessel. If she is found of sufficient tonnage to require documentation, it is necessary for the owner to call at the office and sign an application for an official number, which is forwarded to the Commissioner of Navigation. Upon receipt of which a number if assigned to the vessel. That number is sent our office and we notify the owner of the vessel of the number and give him instructions how to put it on the vessel, and the net tonnage.

Q In other words, the proceedings initiated first by the owner who wants to register the boat and have it licensed is by directing attention to the office that he is going to make application for license, is that correct?

A Well, in the first place, the vessel is measured to see whether she requires documentation.

Q In other words, in the process of construction notice is sent to your department and you send a man over and measure during the course of construction to determine its size and its capacity and so forth?

A Yes, sir.

Q Following that then the license issues according to the verification made by actual measurement of the size of the boat as well as the tonnage?

(Testimony of Carl O. Metcalf)

A On receipt of the admeasurement certificate and the vessel is found of sufficient size to be documented, he files application for official number, as I stated, and before documenting the vessel it is necessary that he produce builder's certificate from the builder, showing that the vessel was built and who it was built for.

Q And give specifications?

A Yes, sir; copy of the admeasurement certificate is furnished and that shows the specification.

Q Do your records disclose when those measurements were taken in this instance?

A Well, not any more than the year 1928. The admeasurement certificate bears the date, but on the document, we only put down the year.

Q Do you keep in your record copies of bills of sale that issue in instances of transfers?

A Documented?

Q Yes.

A Yes.

Q And you have the bill of sale from J. H. Curwin to Ward Daniels, upon which the government certificate for license—what is the exhibit number on that license, the last one?

THE COMMISSIONER: Exhibit 4.

MR. CHRISTENSEN: Withdraw that question.

Q Government's Exhibit 4 is the license for the "Rethaluleu", issued to Ward Daniels?

A Yes, sir.

Q And that license issues upon the transfer of the boat or bill of sale being taken in your office?

A Being recorded.

(Testimony of Carl O. Metcalf)

Q In other words, the bill of sale precedes the licensing of the boat?

A Yes.

Q And the bill of sale is usually in duplicate, is it not?

A Well now, we require them to be in duplicate because the forms are such that you have to write them in by hand. There is not enough space left in the document.

Q So you have a duplicate original that you attach to your records?

A Yes, sir.

Q In the place of writing out a copy?

A Yes, sir.

Q I hand you Claimant's Exhibit 1 and ask you if you have the duplicate original of that in your records?

A Yes, sir, we have.

MR. CHRISTENSEN: I will offer the bill of sale as one of the Claimant's Exhibits.

THE COMMISSIONER: Is this a copy?

MR. CHRISTENSEN: It is a duplicate original.

MR. SOMERS: Have you certified to the last named document?

A No, that is the one that belongs to Ward Daniels.

THE COMMISSIONER: This is not the original. This is the original (indicating) and this is the copy (indicating).

A Original in the book. Ordinarily we keep the copy.

THE COMMISSIONER: Claimant's Exhibit A.

(Claimant's Exhibit A in evidence.)

MR. CHRISTENSEN: That is all. May the record,

(Testimony of Carl O. Metcalf)

where I referred to Claimant's Exhibit 1,—make it Exhibit A.

THE COMMISSIONER: Yes.

REDIRECT EXAMINATION

BY MR. SOMERS:

Q Referring to Claimant's Exhibit A, Mr. Metcalf, are you able to state that that document was issued at the same time, and is a copy of the original document which you have in your possession?

A You mean this one here?

Q Yes.

A Yes, sir.

MR. SOMERS: That is all, Mr. Metcalf. Thank you. Call Mr. Ruggles, please. For the purpose of shortening the time, your Honor, we expect to prove by the witness Ruggles that he is in the Customs Service and has custody of the records of the payment of duties on imports and merchandise entered at Los Angeles Harbor; that he made an examination of the records between July 30, 1928 and October 15, 1928, and goods from the "Rethaluleu" did not pay any duty; no duty was paid on goods from the "Rethaluleu" from those dates.

MR. CHRISTENSEN: In other words, all counsel seeks to show by this witness is that if there was any goods that cleared at this Port—

THE COMMISSIONER: Entered the Port.

MR. CHRISTENSEN: Yes, or entered the Port, that he collected no duty, or the records do not show any duty paid on such goods that entered the Port.

MR. SOMERS: I think we better have the witness.

(Testimony of Newell B. Ruggles)

NEWELL B. RUGGLES,

called as a witness on behalf of the Libellant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SOMERS:

Q Please state your full name.

A Newell B. Ruggles.

Q What is your occupation?

A Deputy Collector of Customs.

Q Stationed where?

A Los Angeles.

Q As Deputy Collector of Customs do you have in your custody the official records showing the payment of duties on imports and merchandise entered at Los Angeles Harbor?

A I have.

Q Have you recently made an examination covering the dates between July 30, 1928 and October 15, 1928, to ascertain whether or not goods or merchandise or cargo from and off the gasoline motor boat "Rethaluleu" paid any duties in this district?

MR. CHRISTENSEN: Wait a minute. That is objected to if the Court please as asking for a conclusion of the witness. Secondly, there is no foundation laid here to show that this gentleman was in charge of the books and records and that he personally made the examination. The question is compound and assumes a fact not in evidence, that the "Rethaluleu" ever carried any goods or whether any goods entered this port—

THE COMMISSIONER: As I intend, it is intended to show by this witness that he examined the records

(Testimony of Newell B. Ruggles)

and that there is no record of any duty being paid on goods from the "Rethaluleu"?

MR. SOMERS: That is it, your Honor.

THE COMMISSIONER: Better let the witness state what knowledge he has of the books and records and that he did make a search.

Q BY MR. SOMERS: Are you in charge of the books and records of the Customs House showing the payment of duties?

A I am.

Q Did you make a search?

A I did.

Q On the duties which I have spoken of?

A Yes.

Q Did you find whether or not goods from the "Rethaluleu"—

A No record whatever.

MR. SOMERS: Thank you, that is all.

CROSS EXAMINATION

BY MR. CHRISTENSEN:

Q You, of course, had no knowledge yourself, no personal knowledge of any goods entering the Port or being brought into the Port by the "Rethaluleu" upon which duties were assessable?

A None whatever.

REDIRECT EXAMINATION

BY MR. SOMERS:

Q In the regular course of the administration of the Customs House affairs, all entries of cargo on which duties are paid, clear through your hands and through your office, do they not?

A Yes, sir.

(Testimony of Newell B. Ruggles)

MR. BALTER: If your Honor please, we have depositions here taken in this case of two witnesses appearing under one cover, and at this time we are going to read from these depositions, and after we have read it, we will offer the depositions in evidence.

MR. CHRISTENSEN: Let me make a suggestion to save time, and also for the convenience of present witnesses that are here. I will have no objection to the record showing that at this stage the depositions are read, so that at the close of the oral testimony it may be read and I will stipulate that as read at that time the record may show it was offered at this stage of the proceedings.

MR. BALTER: We prefer, if your Honor please, to do it as we suggested, because we feel that the other witnesses are corroborative of what appears in the depositions, and I think in the proper sequence of the case, we ought to have this deposition first.

MR. CHRISTENSEN: Then I move for the exclusion of these witnesses during the course of the reading of this deposition.

MR. BALTER: All right. No objection.

THE COMMISSIONER: Who are the witnesses you intend to call with reference to any matters covered by the deposition?

MR. SOMERS: Mr. Pavec, your Honor, and the chief machinist mate, and on one point of the deposition, Mr. Dresser, and Mr. Fletcher. I think that those are the only witnesses who tie up with the deposition.

THE COMMISSIONER: Those mentioned by Mr. Somers will leave the room and wait in some convenience place.

(Testimony of Newell B. Ruggles)

MR. SOMERS: We ask that Mr. Dresser who is more familiar than counsel is with the facts, may remain.

MR. CHRISTENSEN: If the Court please, I think that Mr. Dresser, in view of the fact that the reading of the deposition in itself isn't anything that the gentlemen who are counsel for the government need any aid or assistance from Mr. Dresser—while the other witnesses are present I should not have any objection, but the mere reading of the documents, themselves, he couldn't be of any assistance, and there may be something that might pertain to his testimony, and I feel it is only fair he should be excluded during that period. If it was a matter of assisting counsel, I wouldn't have any objection, but obviously it couldn't in reading this deposition.

THE COMMISSIONER: Without going into it in any detail, one person representing the government in addition to the attorneys of the United States Attorney's office, one person should be here, I believe, and Mr. Somers has asked that Mr. Dresser be that person, so we will not go beyond that unless counsel has some objection other than the statement you have made.

(Mr. Somers takes the witness chair.)

MR. BALTER: Let the record show that Mr. Somers will be reading the answers for the witness Eric Olaf Johnson and I will be reading the questions in place of Mr. Doherty who appears in the deposition.

BY MR. BALTER: "Q—What is your name? A.—Eric Olaf Johnson. Q—Of what country are you a citizen? A—Sweden. Q—You were formerly a mem-

(Testimony of Newell B. Ruggles)

ber of the crew of the Motor Schooner 'Przemsyl'? A—Yes. Q—Where did you sign on that vessel? A—At the Panama Canal. Q—Who was the boatswain on board that vessel when you signed on? A—His name is Kruger. Q—Walter Kruger? A—I don't know his first name. Q—Was he a German boy? A—Yes. Q—What cargo was on the vessel when you signed on? A—Alcohol."

MR. CHRISTENSEN: Just a moment. That question is objected to as asking for a conclusion of the witness and no foundation to show whether the witness or not knew what the cargo was.

MR. BALTER: We expect to tie that up later on, your Honor.

THE COMMISSION: Let that matter go and you can take it up by motion to strike.

MR. CHRISTENSEN: I don't want to be put in the position of objecting to all of these questions.

THE COMMISSIONER: The deposition may be read without prejudice and before adjournment at noon you can make a motion to strike any matter you may object to.

(Reading of the deposition continued.)

"Q—Do you know how many cases? A—About twenty-five or thirty thousand cases. Q—Where did the Przemsyl proceed to? A—We were supposed to go to Vancouver, but we never come to Vancouver. Q—Where did you go from Panama? A—We went outside and stopped outside. Q—Did you discharge the cargo? What did you do with the cargo? A—The speedboats came to take it, to bring it to the shore; the speed boats."

(Testimony of Newell B. Ruggles)

MR. CHRISTENSEN: May I make further objection in view of the fact that any motion I make at the conclusion of the reading of the deposition to strike an answer for any ground that I may urge, and such motion to strike may be considered also as an objection having preceded the question. I stipulate that the transcript for these depositions may be considered as having been read into the record, so that it will avoid the necessity of reading every answer and question, so that it will then be in evidence, subject of course to my making a motion to strike and my objections.

THE COMMISSIONER: To save any time, I will read the depositions at noon. How many pages? A hundred pages?

MR. BALTER: Just exactly a hundred pages.

THE COMMISSIONER: I can probably read it between 12 and 2.

MR. BALTER: We want the record to show the reading of the transcript into the record.

THE COMMISSIONER: Counsel is willing to stipulate it into the record. I will try to read it with Mr. Somers' dramatic inflection.

MR. SOMERS: I wasn't intending to be dramatic, your Honor, but we do want the court to get an oral as well as an eye picture.

THE COMMISSIONER: It is satisfactory if I read this at noon?

MR. BALTER: There is this proposition, however, your Honor. The testimony which follows, will be, in the very nature of the facts involved here, very sketchy and piecemeal.

(Testimony of Newell B. Ruggles)

THE COMMISSIONER: It will take you about an hour to read the depositions.

MR. BALTER: Oh, at least that; probably more than that.

MR. SOMERS: I think most of our difficulty will come from counsel from the other side by interruptions.

THE COMMISSIONER: I am in favor of doing this: I will take a recess at this time and take the depositions and read them and be back at 2.

MR. BALTER: We prefer that rather than to put the witnesses on now without your Honor having read the depositions; otherwise the testimony will be piecemeal.

THE COMMISSIONER: Satisfactory?

MR. SOMERS: Satisfactory.

MR. CHRISTENSEN: Yes.

MR. SOMERS: Then we offer in evidence the depositions of Eric Olaf Johnson and Walter Kruger, witnesses, taken on behalf of Libellant at San Pedro, California, on June 5, 1929, before Ray E. Woodehouse, Notary Public.

MR. BALTER: Let the record show the same stipulation goes for the testimony of the witness Walter Kruger.

MR. CHRISTENSEN: Now, as to the motion to strike, which will be considered as objections to those parts which are not competent and relevant, may the motion to strike be taken at the time of the filing of briefs in this matter, so that I can then indicate in writing and make my record that way. Otherwise I would have to make it to each point at this stage of the proceeding.

(Testimony of Newell B. Ruggles)

MR. BALTER: I think the motion to strike ought to be made before the case is submitted, your Honor.

THE COMMISSIONER: Well, after the conclusion of the taking of testimony.

MR. BALTER: After the conclusion of the taking of the testimony before the case is submitted, rather than in the brief?

THE COMMISSIONER: Let me go over the depositions at noon and when I read them over I will attempt to note any objections that are made at the time the deposition was taken. Was Claimant represented by counsel?

MR. CHRISTENSEN: Yes. I wasn't present at the time. Mr. Kearby was present.

THE COMMISSIONER: I will make notes and you can call my attention to them this afternoon before taking further testimony.

MR. SOMERS: I would like to inquire, is Mr. Kearby still in the case?

MR. CHRISTENSEN: No, he just went down for me in my absence.

MR. SOMERS: No necessity for his presence today?

MR. CHRISTENSEN: No.

THE COMMISSIONER: We will resume at 1:30, or did I say 2 o'clock. I expect I had better say 2 o'clock.

MR. SOMERS: Suit your Honor's convenience.

THE COMMISSIONER: Well, I have quite a little reading to do. Adjourn until 2 o'clock.

(MR. BALTER: The Commissioner suggests that the Reporter copy the original documents appearing in the official records and that Mr. Christensen agrees with coun-

(Testimony of Newell B. Ruggles)

sel for the government that may be done, and on account of that being done, the original book may be withdrawn and no other copies substituted.)

(Reference is made to Libellant's Exhibits 2, 3, 5 and 6, to be copied by the Reporter and substituted in lieu of the original records.)

(Whereupon an adjournment was taken until 2 o'clock.)

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AFTERNOON SESSION

2:00 P. M.

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MR. SOMERS: Call Mr. Pavec.

MR. CHRISTENSEN: The rule of exclusion still applies?

THE COMMISSIONER: Well, if you request it, yes.

MR. SOMERS: It is going to be inconvenient for seating capacity, but if the rule is to be adhered to for one, I suggest it be adhered to as to all.

MR. CHRISTENSEN: I presume that is as to all, except the Claimant himself?

THE COMMISSIONER: Yes, they are using these rooms across the hall, so there is no place for the witnesses to stay except the steps out here.

MR. SOMERS: We could have the door shut and put some chairs in the hall.

THE COMMISSIONER: If you insist upon it, we will exclude all the witnesses.

MR. CHRISTENSEN: Yes.

(Testimony of Newell B. Ruggles)

THE COMMISSIONER: All right, all witnesses for both sides.

MR. BALTER: I think the claimant ought to be excluded too?

THE COMMISSIONER: No, we can't exclude him.

MR. SOMERS: May I inquire respectfully if your Honor has read the depositions?

THE COMMISSIONER: I have. Are there any objections?

MR. CHRISTENSEN: They are, but they will be rather detailed, if the Court please.

THE COMMISSIONER: Well, I see as I read them through that there is probably some few matters here as to one witness, I recall, testifying to what someone told him.

MR. CHRISTENSEN: Yes.

THE COMMISSIONER: That should be stricken. That is the only matter I ran across.

MR. CHRISTENSEN: I think there was some testimony with reference to the 28th day of September, and also I think some other conversations that were had with unknown persons, that I would really have to go through each one of these pages, but I thought we might conserve the time.

THE COMMISSIONER: Let the matter go at the present.

MR. SOMERS: Your Honor, we would like to have the Claimant specify his ground of objection as early in the trial as practical. I think he might do that by tomorrow morning.

MR. CHRISTENSEN: Yes, I can. I probably can catalogue them. I don't believe there will be so many, once I go through it.

(Testimony of J. Pavec)

J. PAVEC,

called as a witness on behalf of the Libellant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SOMERS:

Q Please state your name.

A J. Pavec.

Q What is your occupation?

A First-class boatswain's mate.

Q On what cutter, if any?

A 253.

Q How long have you been on the 253?

A Over three years.

Q Were you on the 253 during the month of September 1928?

A On the coast guard patroling the sea off San Diego.

Q On the coast guard patroling the sea during September, 1928?

A Yes, sir.

Q Directing your attention to the period of the date of September 30, 1928, did the Coast Guard—describe the actions of the Coast Guard vessel 253, beginning about the hour of 7:30 of that morning.

A I have the four to eight watch in the morning, on the bridge.

Q You had the four to eight watch in the morning on the bridge?

A Yes.

Q State what happened during your watch.

(Testimony of J. Pavec)

A I saw two boats drifting on the sea.

Q I want you to show us the location of those boats. Consider now that his Honor is facing south, that this position with the top of the desk is north, that this is east and this is west. I am handing you four matches and ask you to give us the positions of the boats as you observed on your watch.

A My watch, on the south I see the boats.

Q That is north and this is south. Which way was your boat coming?

A My boat comes from the south.

Q Your boat came from the south?

A From the south to the north.

Q Your boat coming from the south and was going north. That is north up there and this is south down here.

A That is south; that is coast.

Q You make your own coast line.

A That is coast (indicating).

MR. CHRISTENSEN: Might I suggest that he takes a piece of paper.

(Paper to the witness)

A Here's coast (indicating).

Q Mark "north" on there; just put an "N" down there for north.

A This is south.

Q Put an "S" down for south. Now, about 8 o'clock in the morning show us your location on the 253.

A Right around that place (indicating.)

Q Mark that "253". What is this up here?

A Coronado Islands.

(Testimony of J. Pavec)

Q Mark them "Coronado Islands".

A The two boats were around about here, about six miles off.

Q Which way?

A We chased the boats. We run about five minutes, we run something like that, and I see a small boat longside of the Przemsyl, and other boat was closer. When the small boat she saw us she come back again and then we chased the boat; then we come between the two boats, and we couldn't fire because—

Q What became of the other boat; you couldn't fire on account of the other boat?

A No, sir. We chased them about 15 minutes and out to sea; about 15 minutes, and our engine broke down and couldn't chase any more; we fired about 14 rounds. Then we come back. As we come back the Przemsyl hoisted her colors, the German flag, and the L'Aquila hoisted the British colors, and then the Przemsyl she put sails and got under way.

Q Both boats got under way?

A Yes.

Q You sighted the two boats at a distance of about six miles?

A When I saw the two boats.

Q What action did one of those large boats take, if any?

A The L'Aquila hoisted some flags; I don't know what means by the flags.

Q Then what happened?

A Then the small boat, she was alongside the Przemsyl, she run.

(Testimony of J. Pavec)

Q Did she or did she not first come alongside and head toward your boat?

A Yes, and then come back again, alongside.

Q Then headed out to sea in line with the Przemsyl?

A Yes.

Q The course taken by the small boat, the motor-boat, prevented your firing upon her?

A We fired about ten rounds.

Q When did you begin firing?

A When we cleared the Przemsyl and the L'Aquila.

Q What was the appearance of the boat you were chasing; describe it as best you can.

(Answer unintelligible.)

Q Did you observe the color of the smallest boat?

A No small boat.

Q I mean did you observe how she was painted?

A A gray paint; light gray.

Q Did you estimate approximately her size?

A About 55 feet long.

Q Were you able to say as to whether—was she equipped with sails?

A Gasoline.

Q It was a motor boat?

A Motorboat, yes, sir.

Q Was it a fast boat?

A Speed-boat; make about 35 or 40 knots.

Q What was its superstructure; do you understand that? Did she have a cabin?

A Yes, small cabin; all those rummies they got them.

MR. CHRISTENSEN: Move to strike that.

THE COURT: The latter part may be stricken.

(Testimony of J. Pavec)

Q It did have a small cabin?

A Yes, and a dory on it.

Q It had a dory on it?

A It had a dory on it.

Q When your engine became disabled that was the end of your activity for the day, was it not?

A Yes, we report back we located the two boats outside and chased the speed-boat and broken down our engine.

MR. SOMERS: That's all.

CROSS EXAMINATION

BY MR. CHRISTENSEN:

Q You say you were on watch from 8 o'clock in the morning until 4 o'clock in the afternoon?

A No, sir, 4 to 8 in the morning.

Q 4 to 8 in the morning?

A Yes, sir.

Q I see. And about what time was it you saw these two boats off in the distance?

A About around 8 o'clock, something like that.

Q Around 8 o'clock in the morning. What kind of a boat? Describe this patrol boat 253 that you were on; how big a boat is it?

MR. SOMERS: Immaterial, your Honor. Immaterial as to the size of the 253.

MR. CHRISTENSEN: I think it will develop that it is material.

THE COMMISSIONER: Overruled.

Q BY MR. CHRISTENSEN: What is the size of the boat?

A 75 foot.

(Testimony of J. Pavec)

Q And it had cabins on too, did it?

A Yes, sir.

Q Now, was anybody else on watch besides you—just yourself?

A The skipper.

Q What time did he go on?

A He was on watch.

Q What time?

A 4 to 8 in the morning.

Q Who was the skipper?

A Mr. Mason.

Q How many men were on that boat, your boat?

A 8 men.

Q 8 men altogether?

A Yes, sir.

Q When you were on watch, you were up in the front part of the boat?

A On the bridge.

Q You were on the bridge?

A Yes.

Q So if you and Mr. Mason were on the bridge?

A Yes; the other men down in the engine room.

Q The other men down in the engine room?

A Yes, sir.

Q Who was the wheel man on the boat?

A I was the wheel man.

Q That was your watch?

A Yes.

Q And did you have any glasses?

A Yes, sir.

(Testimony of J. Pavec)

Q And when you first saw these two boats, they were to the south of you, were they?

A Was to the southwest.

Q How many miles?

A About 8 miles or six miles from there.

Q About 8 or 6 miles?

A Yes.

Q When you were on watch did you use the glasses to see if you could see anything on the sea?

A Yes, sir.

Q You saw these two boats through the glasses?

A Yes, sir.

Q Did you, when you saw them through the glasses, tell Mr. Mason, the skipper, that you saw two boats out there?

A Yes, sir.

Q You were the one to tell him that you saw two boats away out on the horizon, is that it?

A Yes, sir.

Q You were so far away, weren't you, that you could tell whether they were steamboats or sailboats when you first saw them through the glasses?

A Saw sailboat and steamboat and I think there were some more.

Q These two boats you saw 6 or 8 miles away, you first saw them through glasses, that is correct?

A Yes.

Q Were you able to tell from looking through the glasses the first time you saw these two boats—did you know, where you say the little boat was around, were

(Testimony of J. Pavec)

you able to tell whether they were steamboats or sailboats from where you were when you first saw them?

A I saw sail vessel and steam vessel.

Q You could see that from where you first saw the boats 8 miles away, through your glasses?

A Yes.

Q Isn't it a fact that you didn't know it was a steamboat until you got closer up to it?

A No, sir, I could see in the glasses it was steam ship; sail ship and steam ship.

Q When you first saw these two boats out at sea with this little boat you finally say was around these two big boats—you know what I am talking about?

A Yes, sir.

Q When you first discovered, first saw those two big boats through the glasses, they were just specks weren't they? I mean they were just tiny little things, weren't they? I mean they were small things?

A Steam vessel and sail vessel.

Q In other words you were able to tell from looking through the glasses that one of the boats was a steam vessel?

A Yes, sir.

Q Now, then, the other one you were able to tell was also a sail vessel?

A Yes, sir.

Q That was because of the build of the boat and its mast?

A Yes, had three masts.

Q How long did it take you to go from the place you first saw them to the northwest, that is 6 or 8 miles, until you got up there?

(Testimony of J. Pavec)

A Taken about 45 minutes, something like that.

Q About 45 minutes?

A Yes, sir.

Q Did you, when you discovered these two boats out there, did you go full speed ahead?

A Yes, full speed.

Q Before that, you were just cruising?

A Just slow.

Q So, going full speed ahead, it took you 45 minutes to get to the point where these two vessels were?

A Yes.

Q How fast is your boat?

A About make about 12 knots full speed.

Q How many knots?

A 12.

Q How many land miles would that be?

A About 15.

Q Did you say 15 or 16?

A 15.

Q When you got alongside the boats, did you look at your watch to see what time it was when you got there?

A Yes, sir.

Q What time was it?

A It was about 8:45 when we located the boat.

Q You made a report on this, did you?

A No, we chased them.

Q I mean, did you make out a written statement about what you saw?

A Yes, in the log.

(Testimony of J. Pavec)

Q And the log showed that you first sighted the boat at 8 o'clock in the morning and then you went full speed ahead and at a quarter of nine or 8:45, you came up to the two big boats?

A Yes.

Q Who makes that log?

A The skipper.

Q Now, how many minutes away were you from—I think you said—how many minutes were you away from these two big boats when you first saw the little boats; how far were you?

A About 200 yards, probably something like that.

Q You were about 200 yards probably?

A Yes.

Q Didn't you testify in direct examination—I mean before you started following the boat—when did you first see the little boats?

A We chased them off about 15 minutes.

Q What time was it when you first saw the little boats?

A About 8:45, something like that.

Q So you were only 200 yards away?

A Yes.

Q What kind of a day was it?

A Oh, just cloudy; rough sea.

Q It was a rough sea?

A Yes; windy.

Q Pretty heavy sea?

A Yes, sir.

Q And you say it came over between the two boats?

A The small boat came between the two boats.

(Testimony of J. Pavec)

Q When it was between the two boats was it headed out to sea?

A Out to sea.

Q It was headed out to sea. Now, looking at this diagram, the spec marked "X" here is your boat?

A Yes.

Q And the two lines marked "a" and "b" are the two boats that you saw?

A Yes.

Q And the little boat was in between those two boats?

A It was south of the "Przemsyl".

Q It was on the south side of the "Przemsyl"?

A Yes.

Q When you say it was headed out to sea?

A It was gone before and then come back again.

Q Draw a diagram from "B" and show us just where this little boat went.

A She left the "Przemsyl"; she went west; very close, and then she turned around and come back again, and then the boat come close this way, you see.

Q You were between the two boats?

A Yes.

Q Meaning by "between the two boats", the "L'Aquila" and the "Przemsyl"?

A Yes.

Q Between the two designated as "A" and "B", you came between "A" and "B"?

A Yes.

Q And this boat was always on the south side of the boat marked "B"?

A Yes.

(Testimony of J. Pavec)

Q And went on out to sea?

A Yes.

Q Then you came out on the other side of the "Przemsyl" and the "L'Aquila," marked here "A" and "B", and then chased the boats to sea?

A Yes.

Q You say you were only about 200 yards away from it when you saw it at its closest point?

A Yes.

Q How long have you been in the Coast Service?

A About 5 years.

Q You have seen many boats like this, haven't you, like this motorboat?

A Yes, sir.

Q In other words, they look a lot alike, don't they?

A Yes.

Q It is pretty hard to tell one from the other?

A It is pretty hard to tell one or the other; all look alike.

Q You didn't know what boat it was?

A No, sir.

Q It was too foggy and too rough to see the number or name on the boat?

A Yes.

Q For all you know it might have been any one of a number of boats you have seen just like it?

A All the boats look alike; look like the other. It is hard to tell them.

Q You were on that watch all the time while you were chasing that boat?

A Yes.

(Testimony of J. Pavec)

Q You even put your glasses on it, didn't you?

A I handled the gun at the time.

Q That is away up in front in the bow of the boat?

A Around the bow.

Q In other words, from where you were at the gun, you were closer to the small boat than anyone on your boat?

A Oh, yes.

Q You say the small boat was about 55 feet; that is just a guess, isn't it?

A Yes.

Q It might only have been 45 feet?

A Yes.

Q And might have been 65?

A Yes, might.

Q Nobody knew what boat that was at all while you were chasing it?

A I know it was a speed boat.

Q That is all your log said was that it was a speed boat that you were chasing on that day?

A Yes.

Q You say you were patroling the sea from San Diego?

A From San Diego.

Q Do you know what day this way?

A Last day of September.

Q Last day of September?

A Yes.

Q Now, with reference to San Diego and San Pedro, was the boat—these two boats you saw—off of San Diego or off of San Pedro?

(Testimony of George Lore)

A Off San Diego; Coronado Islands.

Q And that was the last of September?

A Yes.

MR. CHRISTENSEN: That is all.

REDIRECT EXAMINATION

BY MR. SOMERS:

Q When you returned from the chase of the small boats, did you read the names on the large boats on their sides?

A Yes, sir.

Q And what were they?

A "L'Aquila" and "Przemsyl".

MR. SOMERS: That is all. In connection with the testimony of this witness, your Honor, we offer the chart drawn by him.

(Libellant's Exhibit 7 in evidence.)

GEORGE LORE,

called as a witness on behalf of the Libellant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SUMERS:

Q State your name.

A George Lore.

Q Your occupation?

A Chief motor machinist's mate.

Q Stationed where?

A San Pedro.

Q What was your business on or about September 30, 1928?

A Chief motor machinist's mate.

(Testimony of George Lore)

Q What boat?

A 253.

Q Where was your boat on September 30, 1928, early in the morning, say about 8 o'clock?

A Well, the exact place I couldn't be sure, because I was machinist's mate; she was off San Diego.

Q Where were you about 8 o'clock on that day?

A I was right at the pilot house.

Q Was your attention directed to any activities on the boat?

A Saw two boats ahead.

Q What did your boat do?

A When we first saw them we ran up full speed ahead and started toward the two boats.

Q State what you observed.

A Well, saw one boat hoist a flag, and the other speedboat came around the bow of the other boat and then he went back around the other side after he sighted us and he went back around and turned around and came back again and there was a couple of men on board the boat and let a man off the boat, or cargo went down or something; looked like a cargo; might have been a man, something on a line; and took out full speed ahead.

MR. CHRISTENSEN: I move to strike as a conclusion with reference to what the small boat did.

THE COMMISSIONER: Oh, let it stand.

MR. SOMERS: Q Go on with what happened.

A We took chase and fired a blank shell. and I went to firing at him and kept firing. Chased him about, I

(Testimony of George Lore)

should say 15 minutes, and we burnt out a bearing and we had to stop.

Q Were you close enough to the two boats to ascertain their identity?

A Well, one of them was the "Przemsyl"; I could make that out plain enough.

Q Were you able to recognize the other boat?

A I didn't get a chance to look at the other boat. I was too busy.

Q Did you recognize her nationality?

A Well, no. The chief boatswain's mate said it was German. I imagine that is what it was. I didn't look at the flag.

Q He described the "Przemsyl" as a German?

A Yes.

Q Did you see any colors on the other boat?

A No, sir.

Q I hand you a book entitled "Patrol Boat Log, United States Coast Guard Boat C G 253," month of .....19.... and ask you to examine the book and see if you can state what that book is?

A Log book.

MR. SOMERS: Do you want to see it? (Handing book to Mr. Christensen.)

MR. SOMERS: Of what vessel is that the log book?

A You mean what vessel it belongs to?

Q Yes.

A 253.

Q I show you certain handwriting appearing under date of September 30, 1928, and ask you if you recog-

(Testimony of George Lore)

nize the handwriting; whose handwriting appears on that page?

A Chief Boatswain Mason.

Q Is the figures and letters, the written figures and letters entirely in a handwriting which you recognize?

A Yes, sir.

Q Whose handwriting is it?

A Mr. Mason's.

Q What was Mr. Mason's connection with the boat on September 30, 1928?

A He was acting skipper.

MR. SOMERS: I offer in evidence, your Honor, the log of September 30, 1928, of Coast Guard Vessel 253. I ask that the witness read it to the record beginning at the hour of 8 o'clock.

THE COMMISSIONER: Read it yourself. Can you read it?

MR. SOMERS: I am afraid I wouldn't understand it all.

MR. CHRISTENSEN: Objected to as hearsay; also that no foundation has been laid for its introduction.

THE COMMISSIONER: Objection overruled.

MR. SOMERS: Q Beginning at 8 o'clock, and stopping at 10 o'clock on that morning, read the record as you find it in the official log of the 253.

A 8 o'clock. Sighted two ships, sped ahead about 6 miles distant. 0840 close to ships, sighted these boats near one. Increased speed to 1100 revolutions per minute, started in pursuit of speedboat, which made off in westerly direction about 30 miles per hour. 0845, opened fire with one pounder.

(Testimony of George Lore)

MR. CHRISTENSEN: I make the suggestion that the Court Reporter, if he can read it, that he can copy it as it is, and it would be more correct than the reading of it, because there is some abbreviations there.

MR. SOMERS: I think he is pretty near through. There is only a few minutes more.

THE COMMISSIONER: All right.

MR. CHRISTENSEN: Object to it being read in evidence as being secondary evidence.

THE COMMISSIONER: Sustain your objection on that ground. The log itself is in evidence.

MR. SOMERS: The only reason we are pursuing this course, this is the official book of the Coast Guard and we desire to return it.

MR. CHRISTENSEN: I propose that the Court Reporter, at the recess, copy this. I will stipulate if the Court Reporter cannot decipher any of the writing there, he may have the assistance of the witness.

THE COMMISSIONER: Well, I will receive the log in evidence. As to how you are going to make a record of it and how you are going to return it, you will have to figure that out. Counsel objects to the witness reading it into the record.

MR. SOMERS: You don't object to the contents going into the record?

MR. CHRISTENSEN: Yes, I have already objected to the contents going in.

MR. BALTER: We will waive the reading of it.

MR. CHRISTENSEN: Object to it as incompetent, irrelevant and immaterial.

(Testimony of George Lore)

MR. SOMERS: We stipulate that the Court Reporter may copy it into the record in full, and it is offered and received, your Honor?

THE COMMISSIONER: Yes, received. It will not be marked, as I understand it is satisfactory that it be copied into the transcript and the original returned.

MR. CHRISTENSEN: Yes.

(Libellant's Exhibit 8 in evidence.)

MR. SOMERS: That is all with this witness.

MR. CHRISTENSEN: Just a moment, Mr. Lore.

CROSS EXAMINATION

BY MR. CHRISTENSEN:

Q You are a machinist's mate?

A Yes, sir.

Q What are your duties on board this boat?

A To assist the machinist.

Q The machinery is down below, is it?

A Yes, sir.

Q On this particular day were you on duty at the hour of 8 o'clock?

A I was in the wheelhouse; that relie*ve* a quarter to eight.

Q Wheelhouse?

A Wheelhouse, riding. We sighted the boat at 8 o'clock; that relief at a quarter to eight.

Q Went upstairs to the wheelhouse?

A Anything I could do after 8 o'clock. I got off watch.

Q Who was up in the wheelhouse? The wheelhouse is the pilot house?

(Testimony of George Lore)

A Yes.

Q Who was up there?

A The whole crew were there, all but the cook and one engineer.

Q That was when you sighted these boats?

A Yes.

Q They were there before you sighted them, these two boats?

A Part of them; not all of them.

Q Who were there before you sighted the two boats?

A Maxfield, Mason, Pavec, and myself; a seaman was there. I don't know what his name is; I can't recall who it was.

Q That was just before you sighted the boats?

A Yes, sir, before we sighted them.

Q And immediately after that the rest of the crew except two came up?

A They was all there except two, one engineer and the cook.

Q After you sighted them who else came up to the wheelhouse?

A That was all.

Q Then they were all there before you sighted the boats?

A They were all there when we sighted the boats, the whole crew.

Q Were they all on relief at that time?

A No, I was the only man had relief.

Q Were all the others on duty up in the wheelhouse?

A Oh, no, only one man on duty there, the guy that had the wheel.

(Testimony of George Lore)

Q Besides the man who had the wheel, the rest on relief were up there as spectators?

A The rest were up there—it is where they ride most of the time.

Q How many miles were you away from those two big boats when you first sighted them?

A It wasn't miles; about 500 yards I judge, the best estimate. I didn't measure it.

Q 500 yards.

A I wouldn't say sure 500, but about that.

Q How long did you take to steam up to the two big boats?

A I didn't time it.

Q Well, how fast did your boat go?

A About 14.

Q 14 knots?

A About that.

Q Well—

A I couldn't say exactly, about 1200 revolutions.

Q Being a machinist you are able to tell by the number of revolutions of your engine how many knots the boat will travel, aren't you?

A Yes.

Q How long have you been on that boat?

A I don't know exactly; about 3 years and a half.

Q About 3½ years?

A About that.

Q Your best judgment is that it is 14 knots?

A Well, about that, I wouldn't say sure, because sometimes they make it and sometimes they won't, according to the condition of the weather.

(Testimony of George Lore)

Q What was the condition of the weather?

A Well, the condition of the weather wasn't good. I am not a navigator. I am a machinist. I don't know what a boat will make in any condition of the weather. Some conditions it will make more and some less.

Q Was it rough?

A Kind of rough.

Q Was it cloudy or hazy?

A Kind of hazy.

Q Was it so hazy you couldn't distinguish boats at a distance, so as to identify them, at a distance of 100 feet?

A Oh, no.

Q Would you be able to identify, in that kind of a haze, Mr. Somers here at a distance of 200 feet?

A Yes, could see him plainly.

Q Well, you could see the object plainly, but could you be able to identify the object if it was Mr. Somers, as Mr. Somers that you saw in the haze that existed at that time?

A Yes.

Q Well, at what distance would you say you would not be able to see him because of the hazy condition?

A Well I wouldn't estimate that because I don't know.

Q You say you were 500 yards away from these two boats when they were first sighted?

A I said about 500 yards.

Q You were present when the boat was first sighted?

A Yes.

Q How long had you been there before it was sighted?

(Testimony of George Lore)

A Oh, about 2 minutes.

Q As soon as you sighted them, you went full speed ahead?

A Not exactly right away when we sighted them. Saw the speed boat come around the bow of the ship.

Q. How many yards away when you sighted the speed boat?

A Oh, I don't know.

Q Were you closer?

A Some closer, going that direction.

Q How long was it, as you were going toward the boats, after you sighted them, when you first saw the speed boats?

A I don't know exactly the time.

Q Was it a minute or two after you sighted the speed boats?

A I should judge about that; maybe more, maybe less.

Q What is your best judgment?

A I don't know; 4 or 5 minutes.

Q So that boat would have covered 500 yards in 5 or 5 minutes?

A Yes, if running full speed, but when we started we wasn't running full speed.

Q What speed were you going?

A 600.

Q That would be—

A About 7 miles.

Q 7 miles an hour. Then it would take you four or five minutes to travel a distance of 500 yards at the speed you were then going?

(Testimony of George Lore)

A Oh, about that; about 10 minutes.

Q About 10 minutes. In other words you are now saying it would take 10 minutes at 7 knots to travel a distance of 400 or 500 yards?

A About that. I don't say for sure. I never figured it out.

Q How long did it take you from the time you sighted the two big boats for you to draw up alongside of them?

A I don't know.

Q How many minutes?

A Well I don't know how many minutes.

Q What is your best judgment?

A I don't know that. I wasn't up on the top side. After we sighted these vessels I went below, after we sighted the speed boat.

Q How soon after you saw the big boats, was it you saw the speed boats?

A 4 or 5 minutes, I should judge.

Q Then you went down below?

A Went down below after they ordered full speed ahead.

Q And you stayed down below until one of your bearings burned out?

A Stayed down below until they started firing and then I came up again.

Q How far away were you from the two big boats when you started firing?

A I don't know.

Q Well, were the two big boats out of sight?

A Didn't pay any attention to them.

(Testimony of George Lore)

Q You don't know what the condition of your boat was with reference to the big boats when they started firing?

A No.

Q Did you go around the big boats, or did you go between them?

A Between them.

Q Were you down below when you went between them?

A I was in the hatch.

Q Where is the hatch with reference to down below?

A Aft the pilot house.

Q Then you had gone down and come up, is that it?

A Yes.

Q At that time you didn't notice the names of these big boats?

A I noticed the one.

Q At that time?

A I noticed that before.

Q Before you went down?

A Before I went down.

Q How close were you to that when you went down?

A Oh, I don't know; maybe 45 yards.

Q And then you went down to the engine room and went straight back up again?

A Went down and looked around and came back up in the hatch.

Q At that time when you came back up in the hatch you were between these two boats, is that it?

A Just a little past them.

Q When you were going full speed ahead weren't you required downstairs?

(Testimony of George Lore)

A Oh, no, as long as I had a man down there.

Q What did you go downstairs for?

A To look matters over.

Q How long did you stay downstairs?

A I don't know how long I stayed down.

Q What did you do?

A Went down to look around.

Q Well, did you make any check?

MR. SOMERS: Immaterial, your Honor, whether he made a check. We are concerned with the chase and not with the activities of some member of the crew.

THE COMMISSIONER: Counsel is entitled to test their memory, but I think you have gone far enough. He went downstairs to look over the machinery.

MR. CHRISTENSEN: I think it has gone far enough too, Judge.

Q Now, you didn't man one of those guns, did you?

A No.

Q Did you watch the entire chase?

A No.

Q All you know was that it was a small speed boat that you were chasing?

A Yes.

Q You have seen many speed boats like it before?

A Oh, yes, a few.

Q And the only name you saw out there was that on this German boat?

A How's that?

Q The only name you saw on any boat was that on the German boat?

A That is all.

(Testimony of George Lore)

Q The "Przemsyl"?

A That is it.

Q You have seen many other boats similar to this speed boat?

A Oh, yes.

MR. CHRISTENSEN: That is all.

REDIRECT EXAMINATION

BY MR. SOMERS:

Q Do you know of your own knowledge when the two boats, exactly when the two boats were first sighted by the man on watch on the 253?

A Sighted at 8 o'clock.

Q They were sighted at 8 o'clock?

A Yes, sir.

Q Where were you at 8 o'clock?

A In the wheelhouse.

Q In the wheelhouse?

A Yes, sir.

Q You stayed in the wheelhouse approximately how long?

A About 10 minutes; 5 or 10 minutes.

Q Observing what was taking place?

A Yes, sir.

Q Then you went below?

A Yes, sir.

Q And were below for approximately how many minutes?

A About a minute and a half, maybe two minutes, and I was riding in the hatch after that.

(Testimony of George Lore)

Q With reference to the size of the boats you were chasing, and its class, is it or is it not one of the fastest speed boats you have ever had occasion to chase?

MR. CHRISTENSEN: Object to that as calling for a conclusion of the witness; no evidence as to what other boats he has chased in the record.

THE COMMISSIONER: Sustained.

Q BY MR. SOMERS: Have you ever chased any other boats as fast as this?

A Well, no.

MR. CHRISTENSEN: I didn't have an opportunity to object, if the Court please. Move to strike the answer.

THE COMMISSIONER: Denied.

Q BY MR. SOMERS: From your position, how long—what was your estimate of the size of this boat, as to length?

A Oh, about 65 feet.

Q And did you observe its color?

A Gray.

Q And could you describe it as to equipment, as to what it was equipped with; what made it run?

A Well, no.

Q From your observation of it, what kind of a boat was it?

A Speedboat.

Q Equipped with what?

A Liberty engines.

Q How far away did you say you were when you first sighted the two boats?

A About 500 yards.

(Testimony of George Lore)

Q And how far away were the boats from each other?

A Possibly about 600 or 700 yards.

Q That is your distance at 8 o'clock. You didn't make the record in the log?

A No, sir.

Q And that distance at 8 o'clock in the morning, when you first saw the boats, is based on memory only. You didn't make any memorandum at the time?

A No; memory only.

Q I am going to show you the log of the vessel and ask you if you agree with the statements therein placed by the commander of the boat, Mr. Mason.

MR. CHRISTENSEN: That is objected to, if the Court please, as incompetent, irrelevant and immaterial. It is not a question of what this person agrees, but what he is able to testify to. It calls for an opinion of the witness.

THE COMMISSIONER: I think the objection is good. He has already testified as to what occurred. You have the log in evidence.

MR. SOMERS: I think that in reference to the log, your Honor, I limited myself to 10 o'clock. In reference to the log I wish to conclude with 12 o'clock, your Honor, on that date. It completes the watch.

RECROSS EXAMINATION

BY MR. CHRISTENSEN:

Q Mr. Lore, if I should show you a picture, would you be able to identify that speed boat from a picture?

A No.

Q That you would not be able to do?

A No, sir.

MR. CHRISTENSEN: That is all.

(Testimony of John A. Fletcher)

JOHN A. FLETCHER,

called as a witness on behalf of the Libellant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SOMERS:

Q Please state your name.

A John A. Fletcher.

Q And your rank?

A Lieutenant, Junior Grade.

Q What service.

A United States Coast Guard.

Q What is your present official position at the Base?

A Executive Officer; at present acting Commander.

Q As such acting Commander, have you in your custody—have you the custody and control of the files and records of the Base?

A I have.

Q Where are your papers?

(Papers handed to the attorney.)

Q I hand you this file designated 1928—6014 (A), and ask you what that is?

A This is a record, better known as our daily activity report; daily report of activities.

Q What does that record contain?

A Contains the location—information and location of the various vessels in or out of the Port.

Q Referring to your records which have been produced, and beginning with the 30th of July, 1928, are you able to state, or will you please state from your records, the position as shown by the official record,

(Testimony of John A. Fletcher)

of the gasoline motor boat "Rethaluleu", between July 30 and October 15.

MR. CHRISTENSEN: Wait a minute (examining the record referred to.) I would like to inquire on voir dire, if the Court please.

THE COMMISSIONER: All right.

Q BY MR. CHRISTENSEN: These records that counsel has shown you, and which you have before you, are carbon copies of what?

A Carbon copies of the activity report.

Q Who makes out those reports?

A The stenographer.

Q At whose direction?

A The Commanding Officer.

Q From what material, if any?

A Guard Book.

Q From some guard book?

A Guard book.

Q And that would appear to be the signature of the Commanding Officer.

A Yes.

Q He was the commanding officer at that time?

A Still the regularly assigned Commanding Officer, but he is now sick.

Q These reports are written up from other date by the stenographer?

A Correct.

Q And she puts his name on there in typewriter?

A Correct.

Q That goes into your files?

A Correct.

(Testimony of John A. Fletcher)

Q You have nothing to do with the making of those records there?

A I have not.

Q They have not been made under your direction either?

A Not these, no, for this period.

MR. CHRISTENSEN: Object to that if the Court please, on the ground there is no foundation, and there is no proof of authenticity. There is no proof of verity of the entries therein, and it is secondary; and upon the further ground that it does not admit of any opportunity of cross examination, and it is no evidence of the facts therein contained. It is evident from the showing that these are copies rather than the originals—not merely because they are carbon copies, but the document itself, even if the other was here—it is merely to develop the method and system, with which he hadn't anything to do at all. They were not memorandums of original entry and if anything, they were hearsay and the conclusion of somebody else. One is absolutely deprived of any opportunity of cross examination respecting them. There is no proof of the facts, no verity of the facts therein contained.

MR. SOMERS: You are not charging it is manufactured?

MR. CHRISTENSEN: I am charging—not in this case of course. I am not foolish, but I do say whoever makes this, we are entitled to cross examine, as to the expressions used there and with reference to what they mean and what character of research or investigation was made. We haven't any of this opportunity. It simply

(Testimony of John A. Fletcher)

states a conclusion of some third person, heavens knows how far down the line.

THE COMMISSIONER: The question of these records has been argued before. I don't recall the case; in one of these cases. I think it was a case in which you appeared as counsel.

MR. CHRISTENSEN: Yes.

THE COMMISSIONER: And they were excluded, as I recall. That was the original guard book.

MR. CHRISTENSEN: Yes.

THE COMMISSIONER: This is a copy that is made apparently from the original guard book, such as we had in that case. Where is the original book?

A I couldn't locate it in our files.

THE COMMISSIONER: I am not satisfied with that ruling for this reason, that, while it is hearsay, and while it does not give the opportunity of cross examination, in admiralty there have been some exceptions made to the hearsay rule. The log of the vessel is received and this is somewhat in the nature of the law of the vessel. It is notorious, well known, that sailors are men that do not very often stay in any place for any great length of time. If there is some showing it is impossible to obtain the testimony of the witness and there is some record to bear upon the fact, I think it should be received. In addition to that, when the government is offering its proof to show probable cause for the seizure, evidence can be offered and can be received that is not strictly according to the rules of evidence, to show what the officer making the seizure, what knowledge he had and what was before him at the time the seizure was

(Testimony of John A. Fletcher)

made, his authority to order the seizure. That constitutes an exception to the rule. But the records, as such, cannot be offered and received unless there is some foundation laid to show the necessity of offering evidence of this character, and to show that all of the safe guards possible are thrown about it.

MR. SOMERS: Yes, your Honor.

Q BY MR. SOMERS: Mr. Fletcher, did you at the request of the United States Attorney, make a search for the guard book concerning the period in question?

A I did.

Q And did you direct others to assist you in that search?

A I did.

Q And the search was made under your direction?

A It was.

Q And what has been the result of that search?

A I am unable to locate the guard book in question.

Q Is the man within your district, within the southern district of California, that is the jurisdiction of this court, who made the original entries within the guard book?

A No.

Q Are you apprised of his present whereabouts?

A Port Townsend, Washington.

Q The records which are now before you, and about which we have been talking, are the only records in your possession concerning the whereabouts of the "Rethaluleu" for the period under consideration, are they not?

(Testimony of John A. Fletcher)

MR. CHRISTENSEN: Just a moment. Object to that. The question is leading and also asking the witness to state a conclusion.

Q I will ask you if you know.

THE COMMISSIONER: He has already testified he could not find the guard book. Hasn't that been covered?

MR. SOMERS: I think it has. I think it is repetition. We submit this is the best evidence. It is the only evidence available.

THE COMMISSIONER: Can you show how these records are made up? What they represent?

(Book handed to the Court.)

THE COMMISSIONER: This does not show the same information as the guard book, does it? As I remember the guard book I examined one time, it showed the information in a different form than this. This is more of a resume of the guard book.

A The entry in the guard book has been changed to show exact location of vessels, where they are moored; anchored at different anchorages.

THE COMMISSIONER: Well, the guard book is probably in your office.

MR. SOMERS: We have made a diligent search, your Honor.

THE COMMISSIONER: As I remember this period of time covers the same period of time that the "A 1817" and "The Seal" case and all that. Those books were here and were offered in evidence and excluded at that time.

(Testimony of John A. Fletcher)

MR. SOMERS: I have taxed the recollection of various counsel, both for the government and for the parties in this case, and also examined the files and am unable to locate them.

MR. CHRISTENSEN: It will appear I believe, in the case of the "A 1817"—no, it was the case of "The Seal." Your Honor didn't hear that case.

MR. SOMERS: Your Honor, that refers—

MR. CHRISTENSEN: This is legal argument. They produced a book and they produced the guard in connection with whether or not "The Seal" was in or out of Port. Counsel had an opportunity, when he declared that the guard book showed that they did not search any part of the west basin they cross examined as to the character of the search, and the search was such that it could have been exactly at the place where they contended it was, because they never went to that spot and they made a conclusion from a very meager examination.

MR. SOMERS: I will have to ask that counsel desist summing up some other case which is not before the court; no foundation; and we ask that the remarks of counsel be stricken from the record.

MR. CHRISTENSEN: Well, consider it a hypothetical case, then.

THE COMMISSIONER: You don't need to go into that. The only question here—I have indicated this much, at the time of the case, as you recall, I ruled that the guide book could not be received. I don't know how Judge Willis ruled. Did he have the same question before him?

(Testimony of John A. Fletcher)

MR. *CHRISTENSE*: No the person himself was there and they had the opportunity of cross examination in that matter, so it was not presented as it is here. I may say they filed very lengthy exceptions, and argued the case for a day and a half and submitted some proof.

THE COMMISSIONER: I examined the Judge's decision to see if he decided that point and he did not and I have since then come to the conclusion that in that particular case I should have admitted the guard book, but I have examined this record, and considering that it has been offered here and it appears to state the conclusion of whoever prepared this report, this record that you call the activity report, that seems to be the conclusion of someone, whoever it was that made it up, drawn from the guard book or whatever records they were, so this is not the same thing as the guard book. Without passing on the question of whether or not the guard book would be rec*ie*ved, I think I am safe in saying that this particular record here should not be.

MR. SOMERS: We offer it under the best evidence rule, your Honor.

THE COMMISSIONER: In the first place, is there anyone here, any member of the crew of the Patrol boats that is familiar with the patrol made during this period of time?

MR. SOMERS: I am afraid not, your Honor. May I make this observation, that considering the fact that the vessel had an owner and a master and someone who was officially designated with the responsibility of that vessel at all times, that should be conflict between their

(Testimony of John A. Fletcher)
recollection and the recorded data of the Coast Guard, that it would be a simple matter to—

THE COMMISSIONER: This is not the guard book. As I remember the guard book was the entries made by the men that ran the patrol boats; who had charge of the patrol boats. They would go around in the morning and evening and check up the boats in and out of the harbor, and they would put down what they observed; say so and so, and give the location where the boat was, and what its condition was as they observed it. Now, here you have a record in which, on a certain day, the one that prepared it puts down two lists, "Known rum runners in port" and "Known rum runners out of port." That is a conclusion.

MR. SOMERS: We will agree that the conslusion as to "known rum runners in port" and "known rum runners out of port" may be considered as a conclusion. We do not seek to bind the Claimant by that recorded statement, but we do feel that the essence of the fact that the boat under consideration was in or out of the harbor, according to the check made, and recorded, is material and ought to be received.

THE COMMISSIONER: The record does not show that. I will say this, that as far as the fact of any weight is concerned, these documents you have here would have no weight, even if they could be admitted.

MR. CHRISTENSEN: Inference upon inference, even to allow any exception to the hearsay rule.

MR. SOMERS: We offer to prove, your Honor, from the document in question, that the rum runner—beg your pardon—that the "Rethaluleu" was in Port and out of Port on the respective days as stated in this document.

(Testimony of John A. Fletcher)

MR. CHRISTENSEN: That isn't an offer of proof.

THE COMMISSIONER: I am going to sustain the objection for the reason this appears to be a copy of the record that was prepared by the Coast Guard from their records, and it does not come under the best evidence rule. It could not be offered in lieu of the guard book on a showing that the guard book is gone, that you could not find the guard book. This is not a copy of the guard book. In doing that I am taking notice of what the guard book is. There is nothing in the record to show, but I have seen the guard book and have examined it. It was here in another case. There are so many difficulties in the way of receiving evidence of this character, that I don't believe I can do it.

MR. SOMERS: May we have the document marked for identification, your Honor, and have an exception to your Honor's ruling?

THE COMMISSIONER: I will mark them for identification and you may have them included as a part of the record in this case.

MR. SOMERS: On further reflection, your Honor, may we have the privilege of renewing the offer?

THE COMMISSIONER: Oh, yes, you may renew the offer.

MR. CHRISTENSEN: May I inquire some further with regard to something that was developed subsequent to the objection?

(Testimony of John A. Fletcher)

THE COMMISSIONER: Yes.

Q BY MR. CHRISTENSEN: On the 30th day of July, were you stationed down there?

A I was not.

Q Were you on the 30th of August? I mean of 1928?

A I was not.

Q When did you first come there?

A About 6 weeks ago, approximately.

Q Then you don't know who the men were that were on these different patrols on these different days in 1928?

A Just my records.

Q July, August and September.

A Just from my records.

Q You stated that one of the men on the Coast Guard was up at Port Townsend?

A I did.

Q Are you able to state who was the patrol on July 30th?

A Not without the guard book, no.

Q You cannot say now?

A Not without the guard book, no.

Q Can you say who was on July 31st?

A Not without the guard book, no.

Q Or any of the days of the month of August, without the guard book?

A Not without the guard book.

Q Or of September?

(Testimony of John A. Fletcher)

A Not without the guard book.

THE COMMISSIONER: You are cross examining as to what? We haven't received this, so what is this about? There has been no testimony given by this witness except in an effort to identify the record, which has been excluded, so I don't see the necessity for cross examination.

MR. SOMERS: I think that is all for the present, Lieutenant. May the record reflect the offer, and may the document, with the permission of Court and counsel, remain in the custody of Lieutenant Fletcher?

THE COMMISSIONER: If you want these, I will mark these so they will be identified at a later time. I will mark them for identification.

MR. SOMERS: I don't want the situation to occur again.

MR. CHRISTENSEN: The only thing is in completing the record, if they offer it for identification what is the situation going to be?

THE COMMISSIONER: I am marking it so if at any later time if the matter comes up, we will know what we were discussing at this time.

MR. SOMERS: In other words, you are waiving a continuous custody of the Court of the document?

MR. CHRISTENSEN: As far as I am concerned.

THE COMMISSIONER: Mark it 9 for identification.

(Libellant's Exhibit 9 for identification.)

THE COMMISSIONER: Exhibit 9 for identification is returned to this witness and withdrawn.

(Testimony of William E. Dresser)

WILLIAM E. DRESSER,

called as a witness on behalf of the Libellant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SOMERS:

Q State your full name and occupation.

A William E. Dresser, Special Agent Bureau of Prohibition.

Q How long have you been in the Federal Service, Mr. Dresser?

A Since April 1st, 1925.

Q In what department have you served?

A From 1925 to 1926 in the Customs Service; 1926 to 1927 in the Intelligence Bureau, Department of Internal Revenue; July 1st, 1927 to the present time in the office of the Special Agent, Bureau of Prohibition, United States Treasury Department.

Q Have you seen the Motor Boat "Rethaluleu"?

A I have.

Q Do you recall when you first saw her?

A I have seen her at various times. The first time, to the best of my recollection, being during the month of August of 1928.

Q Are you acquainted with the Steamship "Przemsyl"?

A I am acquainted with the Schooner "Przemsyl."

Q When did you first see the "Przemsyl"?

A I saw her the first time on October 15, 1927.

Q At what place?

A At Colon, Panama Canal Zone.

Q Did you see her subsequently?

A Yes.

(Testimony of William E. Dresser)

Q Where?

A New Orleans, Louisiana and Los Angeles, San Pedro.

Q Did you have occasion to board her at New Orleans?

A I did not at New Orleans. Beg your pardon, I boarded her at New Orleans.

Q Did you observe the equipment on board her at New Orleans?

A I did.

Q Are you able to testify as to whether or not there was a radio, there radio equipment on board the "Przemsyl"?

MR. CHRISTENSEN: Just a minute, if the Court please, I object to it on the ground it is very remote, the time of October 15, 1927, the date alleged in the libel being a year subsequent.

THE COMMISSIONER: Overruled.

A I participated in a search of the vessel "Przemsyl" at New Orleans, subject to her seizure there on October 29, 1927, and at that time failed to find radio equipment aboard the "Przemsyl."

Q. Did you have an occasion to board the "Przemsyl" on the Pacific Coast at a later date?

A. I did.

Q And did you have an occasion to observe whether or not there was at that time radio equipment aboard the boat?

A I did.

Q What was the date of your boarding the "Przemsyl" on the Pacific Coast?

(Testimony of William E. Dresser)

A On December 3rd, 1928.

Q At what point?

A At San Pedro.

Q I think I asked whether or not you found radio equipment on board on that occasion?

A I did, yes.

Q Describe that radio equipment.

A A generator that bore the trade mark of the Crocker-Wheeler Company, Ampere, New Jersey; there was a wind turbine that bore the trade mark of the D. S. Sturtevant Company, Boston, Mass., and there was a gas engine bore the trade mark of the National Radio Company, Pittsburg, Pennsylvania, United States of America.

MR. SOMERS: You may inquire.

CROSS EXAMINATION

BY MR. CHRISTENSEN:

Q What was the size of the engine? Was it motored; did you say radio engine and motor?

A Yes; gas engine, part of the power.

Q What size engine was that?

A I don't recall the power.

Q You have no recollection at this time as to its power?

A Not at this time.

Q How big was it? A. It stood approximately 3 feet high by about 4 feet in width—in length—and about 3 feet in breadth, I should say, my best recollection.

Q What was the size of the wind turbine?

A The wind turbine was, I should say, about 3 feet high by about 2 feet in diameter.

(Testimony of William E. Dresser)

Q And the generator?

A The generator and gas engine were connected. In describing the generator and gas engine, I was describing combining the two.

Q Is that all you know of the engine and radio equipment on the boat, a generator, wind turbine and engine?

A No, I know there was some equipment in the room of Arthur Frister, engineer of the "Przemsyl" at that time.

Q Was that connected up with this other equipment? A. It was.

Q What did you find there?

A There was a receiving set there in the room, and transmitting key, apparently to transmit radio messages with.

Q Describe the receiving set.

A The set consisted of an instrument board and set of ear phones.

Q What transmittal equipment was there, if any?

A There was a key to be operated by the finger as a telegraph key; transmitter to make dot and dash system, I judge; coast system of communication.

Q It had the transmittal key in connection with the transmittal equipment; that was all the transmittal equipment he had?

A No, I wouldn't swear to that.

Q What would you swear to?

A He had a key.

Q Did you find anything other than the key?

A There were other various parts of the equipment there. Some apparently had been torn down.

(Testimony of William E. Dresser)

Q Transmittal equipment?

A I don't know about that. They appeared to be accessories, perhaps extra parts.

Q I am asking you if you found any other transmittal equipment on that boat other than the transmittal key you are talking about?

A There was a generator I described, that generated power for the transmittal of radio messages. That is substantially what I found.

Q Describe the transmitter key as to size?

A It was mounted on a block I believe a black block approximately 5 by 4 inches in size. The key was a black composition, probably hard rubber, about 1" in diameter, connected with the base of the block by a lever, connecting with the wire end of it.

Q Now you say you saw the "Przemsyl" on October 15, 1927 at New Orleans?

A Yes, sir.

Q Did you see it after October 15, 1927, at New Orleans?

A I wish to state there that I saw it October 15 at Panama Canal Zone and October 29, 1927, at New Orleans, at the time of seizure.

Q Then the time you made the investigation or search of the boat, when you say you saw no radio equipment, you are speaking then of October 29, 1927?

A Yes.

Q Do you know how long the boat was at New Orleans?

A I don't understand.

(Testimony of William E. Dresser)

Q Do you know how long the boat was at New Orleans after October 29, 1927?

A The boat was at New Orleans up until April 3, 1928.

Q The first time you boarded the boat was October 29, 1927?

A October 29, 1927.

Q Did you board it after that? A. Yes, sir.

Q When? A. At San Pedro.

Q I mean at New Orleans? That was the only time at New Orleans you were on the boat?

A I rode on the boat, north on the Mississippi River about 50 miles to the Port of New Orleans and inspected the boat during that trip, and after my arrival at New Orleans, the Port of New Orleans, on October 29, and I did board the vessel two or three times between October 29 and the 31st of October.

Q And the 30th of October?

A 31st of October.

Q Well, then, the last time you were on board the "Przemsyl" at New Orleans was on the 31st day of October, 1929?

A About that time.

Q Then you didn't board the boat again until the 3rd of December, 1928 at San Pedro?

A At San Pedro.

Q You do know of your own knowledge that the boat was tied up at the New Orleans Port from October 29 until the 3rd day of April, 1928?

A Yes.

(Testimony of William E. Dresser)

Q And between the 31st day of October or the 1st of November, 1927, at New Orleans, from that time on until the 3rd day of April, 1928, you were never on board the "Przemsyl"?

A I was not on after that.

MR. SOMERS: You mean in those waters?

A Yes, New Orleans.

MR. CHRISTENSEN: I am talking about any waters any place. He was not on the "Przemsyl" from October 29 to October 31, 1927—those were the dates he has given he was on the boat, around New Orleans or at New Orleans—from that time on he didn't board the boat at any place until San Pedro on December 3, 1928?

A That is right. I did not board the boat from approximately the 31st day of October, 1927 until I boarded her at San Pedro, California, on the 3rd of December, 1928.

Q Did you on the trip up the Mississippi to the Port of New Orleans, meet any of the crew?

A Yes, sir.

Q Did you meet a man by the name of Eric Olaf Johnson?

A No, sir, he was not on board.

Q Did you meet one by the name of Walter Krueger?

A. I did.

Q Did you see the boat any time after it left New Orleans April 3, 1928—pardon me, after it left New Orleans in April of 1928 until December 3, 1928 at San Pedro?

A I did not.

Q Did you ever see Kruger between those dates?

(Testimony of William E. Dresser)

A I did not.

Q Did you see him on December 3, 1928?

A Yes, sir.

Q That was at San Pedro?

A San Pedro.

Q Did you see the boat after December 3, 1928?

A Yes, sir.

Q The 4th of December?

A On the 9th of December.

Q On the 9th of December did you meet Eric Olaf Johnson on or about December 3, 1928?

A No, sir.

Q You were at the Port of San Pedro, were you not, on June 5, 1929, at the time of the taking of the deposition of Walter Kruger?

A Yes, sir.

Q And you heard his testimony?

A Yes, sir.

Q Was he in communication with you at all from the time you saw the boat in 1927 at New Orleans and you saw the boat in December at San Pedro, 1928?

MR. SOMERS: Objected to, your Honor as immaterial.

THE COMMISSIONER: Not within the scope of the direct examination. Sustained.

MR. CHRISTENSEN: That is all.

MR. SOMERS: That is all.

MR. CHRISTENSEN: As I understand the log book of this day, that is the thing that is received in evidence; not any other portion of the log?

(Testimony of V. B. Stewart)

THE COMMISSIONER: Well, the major portion of it is not relevant.

MR. CHRISTENSEN: That is true.

THE COMMISSIONER: Counsel is only offering the period of time covering through the morning up till noon.

MR. CHRISTENSEN: Yes. In other words, there was omitted the condition of the sea prior to 8 oclock, when they sighted the boats, and then the return, which is about three lines which shows the condition of the sea, and the roughness of the sea and so forth, and I wanted that portion in evidence, and I think that is material.

THE COMMISSIONER: Point out what you want in there and you can have it added.

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V. B. STEWART,

called as a witness on behalf of the Libellant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SOMERS:

Q What is your name? A. V. B. Stewart.

Q What is your occupation?

A Master boat builder.

Q Where are your works?

A Morman Island, Wilmington.

Q Did your company build the hull of the boat "Rethaluleu"?

A Yes, I think that is one we built.

Q I hand you a paper which you have previously handed to me and ask you what it is.

(Testimony of V. B. Stewart)

A That is the contract.

Q Is that the contract under which this boat was built?

A. Yes, sir.

Q Are the names appended thereto the names, to the best of your knowledge, of the parties therein concerned? A Yes.

MR. SOMERS: We ask that it be offered in evidence, your Honor, as Libellant's next exhibit.

MR. CHRISTENSEN: May I inquire, if the Court please?

THE COMMISSIONER: Yes.

MR. CHRISTENSEN: Is that your signature, Mr. Stewart? A. Yes, sir.

Q Do you know Mr. J. H. Curwin?

A No, I do not.

Q Did he sign that in your presence?

A No.

Q You don't know whether that is his signature?

A I don't know.

MR. CHRISTENSEN: Object, if the Court please, no proper foundation; not authenticated. I think that the signatures look somewhat the same, although I haven't looked at them closely.

THE COMMISSIONER: I was wondering whether there are any other signatures in here. (Examining papers.)

MR. SOMERS: Yes, sir, on the owner's oath there is a signature.

THE COMMISSIONER: If there is no serious question—

(Testimony of V. B. Stewart)

MR. CHRISTENSEN: Received subject to the objection.

THE COMMISSIONER: All right. It will be received and marked Libellant's Exhibit 10.

(Libellant's Exhibit 10 in evidence.)

MR. SOMERS: It is stipulated between counsel, your Honor, that the boat in question, the "Rethaluleu" was seized by the United States Marshall under process of the United States District Court for the Southern District of California, was at the time of the service of said process within the district and is at the present time within the district. Will you assent to the stipulation on the record, Mr. Christensen?

MR. CHRISTENSEN: Yes, I thought I already had.

MR. SOMERS: I desire to direct the Court's attention to Section 615 of the Tariff Act, September 21, 1922, and believing that the government has shown probable cause as defined by the decisions, we await the further word from the Claimant.

THE COMMISSIONER: You have some evidence?

MR. CHRISTENSEN: Yes, we have evidence we want to offer.

THE COMMISSIONER: It is about 20 minutes to 5; we ought to adjourn.

MR. CHRISTENSEN: We could shorten it a good deal if the government would stipulate—I have the witnesses here—I don't ask them to stipulate its competency—but that if called on the witness stand and they were asked the questions they were asked in the case of the A 1817" and "The Seal," that they would so testify here, and the question of its competency would be entirely one

(Testimony of V. B. Stewart)

for the Court. I can put them on and ask the questions and get each answer from the witness.

MR. BALTER: We can't stipulate that, Mr. Christensen.

MR. CHRISTENSEN: Well, it seems it is simply wasting time if it isn't done, because they have already so testified and it will simply shorten the matter up. I can offer each question and answer and at that time the objections can be made.

MR. BALTER: You mean the same witnesses that testified in those cases?

MR. CHRISTENSEN: Yes.

MR. BALTER: You want a stipulation that they would testify the same way the record shows in the "A 1817"?

MR. CHRISTENSEN: Yes.

MR. BALTER: No, we want the opportunity to cross examine.

MR. SOMERS: We don't feel that the "A 1817" and "The Seal" are at all relevant to the cause of action now before the Court.

MR. CHRISTENSEN: If the Court wants my view, I can state it. I think it is absolutely competent.

THE COMMISSIONER: It is not sufficient to say you can only impeach Kruger and Johnson by producing witnesses to show they made some statements differently than they did on the witness stand, and of course, having first laid the foundation by asking them whether they so stated, but any facts that is part of the transaction itself, that were testified to directly, wherein there is evidence to show that fact so testified by that witness is not as tes-

(Testimony of V. B. Stewart)
tified to by him, but that a different state of facts existed with reference to that situation or that transaction, all that evidence is competent.

MR. CHRISTENSEN: No, in the instance of the "A 1817", we had it dragged all the way through this record, as to the different positions that the "A'quila" and "Przemsyl" were in; that they saw it out there so many, many times. I think even as many as 25 times; they saw it there and saw it there at the same time they claim they saw the "Rethaluleu" there. Now, we are going to prove that it just couldn't be there; that the "A 1817" was never there. To that extent even these men were mistaken, or they were unable to observe the facts or they told a falsehood, and we are going to do the same thing with reference to "The Seal" and show exactly what the facts were, when they testified with reference to this transaction.

THE COMMISSIONER: Well, the government shows a case that establishes probable cause. Now the burden has been shifted to you, or rather, having shown that, the burden does not shift, you must assume the burden of establishing the innocense; so now you may proceed tomorrow morning with your case; with your evidence.

MR. *CHRISTENSE*: I propose to show that according to the testimony of these witnesses, these particular witnesses that the "Rethaluleu,"—I don't say I am going to show it for all of them,—the time that was testified to by these witnesses—but I am going to show to a reasonable certainty that as to given positions and at certain times, if each man were telling the truth, and

(Testimony of V. B. Stewart)

if they can be telling the truth and the "Rethaluleu" can be there, I am going to show it was not, and I will show the other boats weren't there.

MR. BALTER: Let's have the witnesses.

MR. CHRISTENSEN: That is what I was going to do. I was stating my theory with reference to the "A 1817".

THE COMMISSIONER: I don't understand exactly what your offer is or your theory is as to the other case. I have the file here and have it available.

MR. SOMERS: It is understood, however, if your Honor please, is it not, that the government reserves the right to put on other additional testimony by way of rebuttal if we find it necessary; that we have not closed our case.

THE COMMISSIONER: You have rested your case. Now tomorrow morning Mr. Christensen undertakes to prove the innocense of the vessel. Now, as to whether you can offer evidence in rebuttal or not, I cannot rule on that now. It just depends to some extent upon what his case consists of. If Mr. Christensen offers facts upon some particular theory to establish the innocence of the vessel, why then you can offer evidence in competition to that.

MR. SOMERS: Although that is generally true, I believe under the rules we are entitled to a ruling that the probable cause for the seizure has been established.

THE COMMISSIONER: You did not ask for that ruling, but I believe you have established a case that is sufficient to show probable cause, and it is necessary now for Mr. Christensen to go ahead now with the evidence.

(Testimony of V. B. Stewart)

You are now in the position, as the matter now stands, very much in this position, Mr. Christensen is in the position of the plaintiff to go ahead now and establish his case. Now, I presume that he will offer proof to a set of facts based upon some theory that he feels will establish the innocence of the vessel, and you may take issue with him as to the facts.

MR. BALTER: Just this point, it may be a fine point, but I think we ought to be clear on it. There is a distinction in our mind between definitely closing the case and resting and between simply saying we have offered sufficient proof to show probable cause for the seizure, and permit the burden to go forward on the part of the plaintiff, the difference being that we have not definitely closed the case and we can later offer evidence which would not be strictly rebuttal evidence.

THE COMMISSIONER: I think it is understood you have now offered your case, your case upon a showing of probable cause and have now rested that case, that part of the case, and it is now for Mr. Christensen to go ahead. You are not foreclosing yourselves.

MR. BALTER: All right. We have other witnesses that, if we were put in the position that we were once and for all closing our entire case, we would put those witnesses on now. We do not care to put them on because we feel we have established sufficient to make the burden shift. However if it develops later on they are necessary, we want the right to put them on, whether they are strictly rebuttal witnesses or not.

THE COMMISSIONER: It would seem to me that from now on it is up to Mr. Christensen to establish the

(Testimony of V. B. Stewart)

innocence of this vessel, and he will no doubt offer proof of a state of facts. Now, you will offer a defense to his state of facts. That is you are coming in and you are offering your rebuttal and you may take issue with him with your evidence on any issue of facts that he raises in his case. In other words you mean that if you, having offered your case, which you say shows probable cause, now the burden is on him; from now on he defines the issue.

MR. BALTER: Yes.

THE COMMISSIONER: It is from his evidence that the issues are formed and not from your case. It would appear that way to me, because the statute states the burden is on him to establish the innocence of the vessel. I can see there is a distinction.

MR. BALTER: There is a fine distinction, and it is just this, we may have witnesses we feel we ought to put on to make a complete case if we have to make a complete case once and for all. These witnesses may not be strictly rebuttal witnesses to what Mr. Christensen puts on.

THE COMMISSIONER: You don't know because he has not offered his case.

MR. BALTER: Assuming he offers a case to show innocence of the vessel at the time of the seizure.

THE COMMISSIONER: From now on the issues will be formed upon his case as I understand it. He is carrying the burden. He comes in and says, "Here is a certain set of facts", and you say, "I take issue with him."

MR. BALTER: We will let it rest at this time and see how it develops.

(Testimony of V. B. Stewart)

MR. CHRISTENSEN: Counsel excused some witnesses until tomorrow morning. If those are witnesses that pertain to any issue in chief in the case, then those witnesses ought to be called now. In other words, if, after I get through with my set of facts, and then they have an idea that they want to bring in some facts that are not in answer, or are not in dispute of the facts I bring in, but are to further establish some fact in connection with their affirmative case of establishing in the initial instance the probable cause, then they are foreclosed, and that evidence should come in the first instance.

THE COMMISSIONER: Well, if it is offered you may object to it and we will argue it then. If counsel for government make a mistake in not offering it now, you can't do anything about it.

MR. BALTER: We will take our chances, your Honor.

(Whereupon an adjournment was taken until 10 o'clock tomorrow morning.)

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Los Angeles, California, Wednesday, May 28, 1930. 10 A. M.

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MR. CHRISTENSEN: With reference to the depositions, I may say I have gone through the first witness' testimony. I have not yet covered the second one, Mr. Kruger, and I will cover Mr. Johnson's testimony at this time, and during the noon hour I will check Mr. Kruger's testimony; and I know I will not complete my testimony, and if there should be any reason arise growing out of

(Testimony of V. B. Stewart)

the objections that I have taken that the government feels they should want to recall these witnesses again, I will have no objection. The first appears on Page 11. The question is, "Q—What did these men do when they came out to the 'Przemsyl'?" Line 17. The answer thereto: "A—They came out and talked to the skipper to get more cargo and bring it ashore." Move to strike the answer as not responsive to the question and it involves a conclusion of the witness.

THE COMMISSIONER: That part following the skipper, "they came out and talked to the skipper", the rest of it seems to be a conclusion.

MR. CHRISTENSEN: Yes.

MR. SOMERS: In ruling on the objections, your Honor, will your Honor read the stipulation under which the deposition was taken. I think it perhaps will clarify it somewhat.

THE COMMISSIONER: It seems it is stipulated that all objections as to materiality, relevancy and competency of the testimony are reserved by all parties. The larger part of that answer, the part I designated, maybe stricken. What is the next?

MR. BALTER: After "skipper"?

THE COMMISSIONER: After "skipper", yes. What next?

MR. CHRISTENSEN: Make the same objection to the following question.

MR. SOMERS: Page and line?

MR. CHRISTENSEN: On the same page.

MR. SOMERS: Line?

(Testimony of V. B. Stewart)

MR. CHRISTENSEN: Lines 21 and 22.

MR. BALTER: There is nothing wrong with that question and answer, if the Court please.

THE COMMISSIONER: There doesn't appear to be anything wrong.

MR. CHRISTENSEN: May my exception be noted?

THE COMMISSIONER: Overruled.

MR. CHRISTENSEN: Next question, line 23: "Q—Did they take cargo away from the 'Przemsyl'?" That is objected to on the ground the question is leading and suggestive and calls for a conclusion of the witness.

THE COMMISSIONER: That will be overruled.

MR. CHRISTENSEN: And the question beginning at the bottom of the page, the last line on page 11: "Q—What kind of a cargo did they take? A—They took cases of alcohol." Wish to strike the answer on the ground it is a conclusion of the witness and no foundation has been laid to indicate that the witness has any knowledge with reference to what the cargo was, and that further on in the examination it was developed on cross examination that his knowledge was based on hearsay, and that he himself did not know that the cargo was alcohol.

THE COMMISSIONER: Said he discussed it with the Captain, didn't he?

MR. CHRISTENSEN: Yes, and he said it was alcohol based upon what he had heard, and I think he also said of his own knowledge he did not know that it was alcohol. That was developed on cross examination. I will be able to refer the Court specifically to that.

(Testimony of V. B. Stewart)

THE COMMISSIONER: Well the cross examination indicates that he gained some knowledge as to the cargo that was on board. The testimony of the following witness gives more detail as to the cargo. Taken altogether I believe that the answer may stand.

MR. CHRISTENSEN: We object to the question, line 18, page 12: "Q—I don't believe I understand you. See if I understand what you have said, so we will understand each other. If I understand what you have testified to previously in your testimony, you said that Tony, Charley, John and George came out on board the "Rethaluleu" to the "Przemsyl" sometime during the month of August; is that right? A—Yes." Object to the question because it is leading and suggestive.

THE COMMISSIONER: It is a repetition of previous testimony. Go back to page 10 and you will find practically the same testimony. I don't think we need to stop with that. Overruled.

MR. CHRISTENSEN: And the objection heretofore made with respect to the character of the cargo and also make a motion to strike upon those same grounds as to the questions and answers appearing on page 13, line 26.

THE COMMISSIONER: Denied. I presume you are making the same objection as to any other mention of alcohol?

MR. CHRISTENSEN: Yes.

THE COMMISSIONER: Page 19, "took alcohol".

MR. CHRISTENSEN: Yes, wherever that appears. I think it appears on several pages. I think on page 15 it appears, and I make also the same motion.

(Testimony of V. B. Stewart)

THE COMMISSIONER: Yes. It is considered you object to all that and you move to strike and the objection overruled and the motion denied and you may have exception.

MR. CHRISTENSEN: The same grounds on the motion to strike and the ruling, your Honor?

THE COMMISSIONER: Yes.

MR. CHRISTENSEN: The question at the bottom of page 13: "Q—What did he do at that time? A—He came on board and he had to sell the cargo to the steamer. He sold 2000 cases." I move to strike the answer as not responsive, and it appears it is a voluntary statement of the witness and a conclusion.

THE COMMISSIONER: It is not responsive, and a conclusion. There is no foundation for it apparently. It may be stricken.

MR. BALTER: I think, if your Honor please, the next two or three questions bring it out more clearly. You can't simply take a half of the question by itself and leave the rest of it standing in the air. If it shows it connects up, I think they ought to stand.

THE COMMISSIONER: I don't see that striking that out will destroy the context. "A—He came on board and he had to sell the cargo". Probably should only be stricken from "and he had to sell the cargo" the first part "He same on board" is responsive. That is all right.

MR. CHRISTENSEN: I also move to strike the question appearing on line 26, page 16: "Did it go back to the 'L'Aquila' then?" At the top of page 17, line 1—

THE COMMISSIONER: Where are you now, 17?

(Testimony of V. B. Stewart)

MR. CHRISTENSON: The question at the bottom of page 16 and *th* answer to that question appears at the top of page 17, line 1: "A—No; it went back to the shore." Move to strike: "Went back to the shore," upon the ground that it is not responsive and that it is a conclusion of the witness and there is no foundation.

THE COMMISSIONER: Well, it seems to refer back to the previous answer: "Q—Was any cargo discharged? A—Yes; it took two or three hundred cases. They came back before they went ashore." "Q—Did it go back to the 'L'Aquila' then? A—No." Well, that may be stricken. It is mere repetition.

MR. CHRISTENSEN: I also want to move to strike the answer at line 24 on page 16 in answer to the question: "Q—Was any cargo discharged? A—Yes; it took two or three hundred cases. They came back before they went ashore." Move to strike the words in the answer: "Before they went ashore", upon the same grounds as suggested in the objection just previously made.

THE COMMISSIONER: The last sentence may be stricken.

MR. BALTER: I don't know if I get the theory of this. This man was on the witness stand and he answered the way he answered *he*. I don't see how half the answer can be stricken out. You can't go over it with a fine tooth comb and tear it to pieces. This man is simply telling the story and I don't think these motions should be allowed.

MR. CHRISTENSEN: There is nothing in the record to show he had any knowledge.

(Testimony of V. B. Stewart)

MR. BALTER: The man's story does not have to be 100% consistent. That is why you have cross examination; but as long as he is telling the story I think it ought to be allowed to stand.

MR. CHRISTENSEN: Not a conclusion.

THE COMMISSIONER: Well, strike that last: "They came back before they went ashore".

MR. BALTER: Exception on our part.

MR. SOMERS: Was that line 24?

MR. CHRISTENSEN: That is lines 24 and 25. And on page 18, line 10: "Q—You never had a radio? A—We got a radio from the shore; they brought it out from the shore." Move to strike that portion of the answer after the word "radio", the words being, "From the shore; they brought it out from the shore." It is not responsive and stating a conclusion of the witness.

MR. BALTER: Not a conclusion; it is a fact.

MR. SOMERS: The question calls for knowledge of the witness and it is responsvie.

MR. CHRISTENSEN: And the knowledge indicated it was not on board and they proved many times it was many miles from the shore and never went to shore at any stage of the proceedings, so it is apparent from his testimony he couldn't have had knowledge and affirmatively shows it is a conclusion.

THE COMMISSIONER: It should have been shown on cross examination. Let that stand; denied.

MR. CHRISTENSEN: May it be considered that motion is also made to strike on the same ground and is overruled and exception allowed?

THE COMMISSIONER: Yes.

(Testimony of V. B. Stewart)

MR. CHRISTENSEN: That is all, specifically, of the questions. I may have overlooked some questions and answers similar to the last two objections with reference to the witness' conclusions as to the boat going ashore and coming from shore, and where that appears in the testimony I move to strike upon all of the grounds heretofore stated.

MR. BLATER: I think Mr. Christensen ought to make specific objections.

THE COMMISSIONER: The motion in that form will be denied.

MR. CHRISTENSEN: Well, I think that is all. I will fly-speck it a little closer this noon.

THE COMMISSIONER: You are all through with this first deposition?

MR. CHRISTENSEN: Yes.

THE COMMISSIONER: I have read the depositions and I don't think there are any other serious questions.

MR. CHRISTENSEN: I presume the government wants the rule applied to the Respondent's witnesses?

THE COMMISSIONER: They have been excluded twice. They are all back in again. How many witnesses will you have?

MR. CHRISTENSEN: There is quite a number of them. I think you will have to stay outside, folks.

THE COMMISSIONER: If there are some of them, it depends on their testimony—any one testifying as to matters covered in the government's case yesterday might be excluded. The only difficulty about excluding witnesses, we have no place to put them. Room 304 is being occupied now.

(Testimony of V. B. Stewart)

MR. CHRISTENSEN: I understand the government has rested?

MR. SOMERS: We stand on the statements made yesterday, your Honor.

MR. CHRISTENSEN: I shall insist if there is anything pertinent to the case in chief that is not legally rebuttable of the case put in by the respondent, that we shall object to it at that time.

THE COMMISSIONER: As far as we can go now, we can say the government is not offering any further evidence. That seems to be the situation.

MR. CHRISTENSEN: Will the Court direct the witnesses, so that I won't be met with an objection from counsel for the other side that they were in the court room.

THE COMMISSIONER: I was trying to see if some of the witnesses were not necessary to be excluded. You wish the Claimant to remain? Which gentleman is the Claimant?

MR. CHRISTENSEN: I think the Captain here isn't on any of the questions yesterday.

(Mr. Christensen indicates the witnesses who are to go outside the court room.)

THE COMMISSIONER: All right, those witnesses designated may be excluded.

MR SOMERS: The Court has asked counsel to designate the Claimant, and the question as yet remains unanswered.

MR. CHRISTENSEN: I thought he was well known.

THE COMMISSIONER: This gentleman here is the Claimant, (indicating Mr. Daniels.)

MR. CHRISTENSEN: Call Mr. Wood first.

(Testimony of Leonard Wood)

LEONARD WOOD,

called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q What is your name?

A Leonard Wood.

Q What is your position?

A Billing clerk, Los Angeles Ship Yards.

Q Were you so engaged during the months of July, August and September of the year 1928?

A I was.

Q Do you remember of having seen the motor boat "A 1817" at any time during the months of July and August, 1928?

MR. BALTER: Objected to as incompetent, irrelevant and immaterial as far as the issues in this case are concerned. We are interested in the "Rethaluleu."

MR. CHRISTENSEN: I think we are interested in the testimony of the two witnesses Kruger and Johnson, both of whom testified that they were on a boat called the "Przemsyl", which was located in three distinct positions, the first off of San Diego in the month of July; the second off the coast of San Pedro in the month of August, and the third off the coast of Santa Barbara in the month of September; that persons they had seen on the "Rethaluleu" they first saw on the "A 1817". I think one of the witnesses testified they saw the "A 1817" at least in two distinct positions, both the first and second, which covers the months of July and August.

(Testimony of Leonard Wood)

I can get that testimony and I believe Kruger testified he saw it at least 20 to 25 times. I will give it to your Honor, all of it. That testimony will be found with reference to the boats on pages 43, 45, 49, 50; 50 I have double-checked, in the language of Amos and Andy, so apparently there was rather a positive statement.

THE COMMISSIONER: What is that number?

MR. CHRISTENSEN: Page 50.

MR. SOMERS: Since *were* are concerned with the position of the "Rethaluleu", I think any observation as to the "Przemsyl" and the testimony of Kruger as to the location of the "Przemsyl" are out of order and not competent.

THE COMMISSIONER: What is it you are going to prove?

MR. CHRISTENSEN: I am going to refute the testimony of Kruger and Johnson.

THE COMMISSIONER: As to what?

MR. CHRISTENSEN: I am going to prove by this witness that during the months of July and August, 1928, and it may even cover September, I am not sure, that the "A-1817" was at their yard, I think after the 6th or 9th of—I think after the 9th of July; 9th of July to September 16th.

THE COMMISSIONER: How does that affect the issues in this case?

MR. CHRISTENSEN: It goes to the credibility of the witnesses Kruger and Johnson. They say that they saw certain things.

THE COMMISSIONER: Just a minute; by the way of impeachment?

(Testimony of Leonard Wood)

MR. CHRISTENSEN: Well, yes. That is, it does go by way of impeachment, but it is not limited solely to the question of impeachment of Kruger and Johnson. I am going to offer it upon that ground, and I am going to offer the testimony upon the additional ground that the evidence developed by the Government in its case in chief was incorrect; that what they say in their case in chief was the things that transpired on the ocean at certain times and places did not transpire, and prove that fact; and I prove that fact by proving that the "A-1817" was not there twenty-five or thirty times like the witnesses testified.

MR. BALTER: We are not interested in the "A-1817" in the case in chief and it is trying to impeach the witness; he is impeaching in an immaterial and collateral manner, which it is a well known fact he cannot do. Whatever happened to the "A-1817" is purely incidental to the "Rethaluleu."

MR. CHRISTENSEN: They testified to the res gestae and the transaction itself. I want to now show—

THE COURT: What do you mean they testified to the res gestae?

MR. CHRISTENSEN: What is that your Honor?

THE COMMISSIONER: That is using a much overworked term rather broadly.

MR. CHRISTENSEN: Well, I think anything a witness testified to, if it was murder, for instance, as to what happened, it goes both to the recollection and to the truthfulness of the witness, as to the subject about which he is testifying.

(Testimony of Leonard Wood)

THE COMMISSIONER: If you were cross examining the witness you would probably be allowed to go into matters affecting credibility; that is what you could develop by cross examination; but could you lay a foundation for impeachment upon some collateral matter? You are talking about murder. If a witness testified that on a certain time he saw a murder committed and at some time during that day or the next day or the same evening he had also seen a burglary, could you come in and offer evidence that there had been no burglary, where the defendant was being tried for murder?

MR. CHRISTENSEN: I don't think that is an apt illustration, because here is a matter which was a continuous offense and hence res gestae is continuous. If it was a specific charge of murder—

THE COMMISSIONER: The rule of res gestae is an exception to the hearsay rule, that is all that is; certain statements made under certain circumstances are admissible because part of the res gestae. You are using the term very loosely.

MR. CHRISTENSEN: Well, that may be so, but the transaction itself,—in other words, if I testify I saw "A" shoot "B" and at the time I saw "A" shoot "B" I saw "X" and "Y" there participating in the matter, holding the hands of "B", then I could call "X" and "Y" to the stand and I could show that it was impossible; in other words, show that "X" and "Y" were actually in New York at that time, registered in a certain hotel.

MR. BALTER: That is all right, if he wants to show the "Rethaluleu was there. Mr. Christensen is laboring under the difficulty, your Honor, by his illustration it

(Testimony of Leonard Wood)

would be cross examination and impeaching by other witnesses. We grant if the witness were here on cross examination you could ask anything you want to, even ask about a collateral matter to go to his truthfulness or memory, or what have you. But by another witness by way of impeachment it is well established you can only impeach as to important and material matters. He is trying to impeach on an entirely immaterial and collateral matter.

MR. CHRISTENSEN: Any evidence in chief that is developed.

MR. BALTER: No, that is not true.

MR. CHRISTENSEN: I may dispute that evidence in chief that is developed in that case that is relevant and material and competent evidence.

THE COMMISSIONER: The contention is that this is not relevant. If you examine a little further and if this evidence is accepted it requires findings of facts that involve another boat, and maybe one or two other boats, and it requires examination and findings of facts upon collateral matters.

MR CHRISTENSEN: No.

THE COMMISSIONER: If you want to offer evidence that the "A-1817" wasn't there, I will have to examine the facts and make a finding as to whether it was there or not.

MR. CHRISTENSEN: Yes, but I didn't mean in the sense it is a matter that is determinative of the issue.

THE COMMISSIONER: I would have to determine that issue before I could determine whether the evidence

(Testimony of Leonard Wood)

in any way impeached the witness. It will have to be impeachment.

MR. CHRISTENSEN: Yes.

THE COMMISSIONER: You get two sets of facts that are not consistent; one of them must be true and the other not.

MR. CHRISTENSEN: Certainly.

THE COMMISSIONER: And that is not impeachment.

MR. CHRISTENSEN: I think that same course is followed—I don't know whether your Honor has had that situation before—I don't know whether Judge Willis is authority or not, but in the case of "The Seal" that is the course that was followed, only they permitted all of the testimony in the "A-1817" case to be read into the record.

MR. BALTER: That is being appealed now, and the fact one error was made is no reason why it should be repeated. We repeat our objections, your Honor, and desire a ruling.

THE COMMISSIONER: I sustain the objection.

MR. CHRISTENSEN: Then, I will make an offer of proof. I will offer to prove by this witness that to the following questions that will be asked him, he will give the following answers: "Q"—

MR. BALTER: I think he simply ought to summarize what he intends to prove.

MR. CHRISTENSEN: I am going to prove—

MR. BALTER: I don't think the record ought to show all those questions asked and the answers given.

THE COMMISSIONER: How much?

(Testimony of Leonard Wood)

MR. CHRISTENSEN: I am perfectly willing to stipulate—

MR. BALTER: Just let the record show what you intend to prove.

MR. CHRISTENSEN: I am going to do it the right way.

MR. BALTER: It is a question whether that is the right way or not.

MR. CHRISTENSEN: I know it is the right way.

THE COMMISSIONER: Let counsel—he has been ruled against, so we will have to allow him a little latitude.

MR. CHRISTENSEN: I am going to offer to prove first: "Q— Do you remember having seen motor boat 'A-1817' at any time during the months of June, August and September, 1928?" And that this witness would answer; "yes;" and the following question: "Q— You say you saw motor boat 'A-1817' during the months of July and August, 1928?" and the answer to that question: "Yes." And to the question: "Q—Where did you see it during those two months?" His answer would be: "I saw her when they brought her into the yards; when she was brought into the yard by the Coast Guard Cutter;" and the following question: "Q—About when did they bring her in?" "A—On July 9, 1928;" that would be his answer. That to the question: "If it was July 9, 1928," that he saw the boat brought in, that he would answer to that question, "Yes, sir, that is the date that the boat was hauled out on the Marine Ways;" and the question: "How long did she remain there", his answer would be: "She remained there from July 9th until September 15th." "Q—What was done to her at that time." To that his

(Testimony of Leonard Wood)

answer would be "The 'A-1817' was overhauled and the motors were taken out and cleaned;" "Q—Was there any change made of the location of the cabin?" And his answer would be: "Yes, sir." And the question: "How long was the 'A-1817' on the Ways?" His answer would be: "We had it in our custody from July 9, 1928, to September 15, 1928."

THE COMMISSIONER: As I understand, what you want to do, you are offering practically the same testimony given by this witness—it was before me?

MR. CHRISTENSEN: Exactly.

THE COMMISSIONER: —In the "A-1817". Cannot you reach this stipulation, that you are offering the same testimony and in the event that when this case is reviewed I am found to be in error in this particular ruling, that the testimony previously taken can be considered?

MR. CHRISTENSEN: Absolutely; that is what I have been suggesting.

MR. BALTER: We won't stipulate to that, if your Honor please. In fact, we want the record to show our objection to this type of proof. I think all counsel is entitled to do is to make a statement of what he intends to prove.

THE COMMISSIONER: Yes. I will allow him to do that if you can come to an understanding. You testified in the case, did you not, in the case of the "A-1817"?

A Yes.

MR. CHRISTENSEN: I am through except for one other question. I have had the files of the "A-1817" brought down.

(Testimony of Leonard Wood)

THE COMMISSIONER: They are here on the table.

MR. CHRISTENSEN: I don't want the transcript. I want to get an exhibit.

THE COMMISSIONER: I wonder if the exhibits are here.

MR. CHRISTENSEN: Yes, they were yesterday.

THE COMMISSIONER: "A-1817" (handing papers to the attorney.) I started to say a moment ago that I don't see that there is any objection to using that testimony that was taken, permitting it to be considered, in the event, upon review of this case, I am found to be in error.

MR. CHRISTENSEN: That is all I wanted to do, is to make the record.

MR. BALTER: We object, because the record will then be encumbered with a lot of testimony that we consider incompetent, irrelevant and immaterial. I think all counsel is entitled to do is to make a statement of what he intends to prove. If you are found to be in error, the case will be retried, in which case he can introduce the evidence.

THE COMMISSIONER: If I am found in error, probably the District Court will send the case back for me to consider.

MR. BALTER: That is what I say. At which time you can consider the transcript in the "A-1817." But at this time all counsel is entitled to do in view of your ruling—

MR. CHRISTENSEN: If counsel don't want to expedite matters and insists on wasting time, I am going to proceed in my own way.

(Testimony of Leonard Wood)

MR. BALTER: It is not a question of wasting time —it is a question of getting a proper record.

THE COMMISSIONER: If you want to make an offer of proof you may make a statement of what you summarize the evidence to be and not read this transcript of the former testimony.

MR. BALTER: That is what I want him to do.

THE COMMISSIONER: And a brief summary too.

MR. CHRISTENSEN: What is that?

THE COMMISSIONER: You will make a summary, and a brief summary.

MR. CHRISTENSEN: I offer to prove by this witness that the picture I have in my hand, on the back of which the stamp appears, "United States District Court, Southern District of California, Claimant's Exhibit A, in case 3486-H", is a picture of the "A-1817," which I have offered to prove was in the yards of his company from July 9th to September 15th.

MR. BALTER: We don't intend to have the record show that picture. If you do, we will certainly object to that.

MR. CHRISTENSEN: I offer to prove that this picture, as I have identified it, is the picture of the boat about which he would testify. May I have my ruling?

THE COMMISSIONER: The matter has already been ruled upon. The objection has been sustained. This is simply your statement of an offer of proof. It is for the purpose of preserving your record.

MR. CHRISTENSEN: Yes; exception. May the record show that the picture, the offer of proof is a pic-

(Testimony of L. H. Williams)

ture taken from the files of this court in the case of the United States vs. The "A-1817", No. 3486-H.

MR. BALTER: We will object to the picture going into the record. I don't care if you identify it.

MR. SOMERS: Counsel can make the statement without asking for stipulation.

THE COMMISSIONER: It isn't going into the record. Counsel is making the statement for the record.

MR. CHRISTENSEN: I am asking counsel, in further identifying the picture, if they will stipulate that the picture which I identify came from those files.

MR. BALTER: I won't stipulate that.

MR. SOMERS: The document which counsel has indicated bears stamp showing official action by an officer of the United States District Court from the Southern District of California and proves its own authenticity.

THE COMMISSIONER: It has my name on it. It is from the files.

MR. CHRISTENSEN: All right; that is all, Mr. Wood.

L. H. WILLIAMS,

called as a witness on behalf of the Libelant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q What is your name?

A L. H. Williams.

Q What is your present occupation?

A Boatswain; attached to Coast Guard, Section 18.

(Testimony of L. H. Williams)

Q Were you engaged in the same occupation during the months of July, August and September, 1928?

A Yes, sir.

Q On July 3rd, what boat were you in charge of?

A C. G. 257.

MR. CHRISTENSEN: I now offer to prove by this witness that on the 5th day of July, 1928, he saw a boat, motor boat "A-1817", and that the boat that he saw was the boat appearing in the picture that I heretofore offered to prove as the picture of the "A-1817;" that he saw that boat on the 5th day of July, 1928.

Next offer to prove that he saw that boat at San Nicholas Island, and that San Nicholas Island is about 40 miles southwest of San Pedro Harbor; further offer to prove that at the time he saw the "A-1817" at that time, that the "A-1817" was swamped and in a water-logged condition, and that he boarded the boat on July 5, 1928. I further offer to prove by this witness that he will testify that the boat at the time he boarded it was in a water-logged condition and had been so for a day or two. Further offer to prove by this witness that he took her in tow and towed her toward San Pedro Harbor; that while so towing her to San Pedro Harbor the boat, the "A-1817", became loose from the patrol ship 257 on which the witness was at that time; that he so lost the boat on the night of July 6th, and later found it in the early morning of July 7th; and that the "A-1817" was then towed to San Pedro. I may say that the testimony shows here Santa Barbara. The transcript should have read San Pedro. The boat was taken to the base at the Los Angeles Ship Yards at that time. Offer to prove all of that and each and every separate offer of proof."

(Testimony of Leonard Wood)

MR. SOMERS: The same objection, your Honor.

THE COMMISSIONER: Same ruling.

MR. CHRISTENSEN: Exception.

MR. SOMERS: I make the observation that the ownership oath was taken on July 27, 1928, as to the "Rethaluleu".

MR. BALTER: And these matters are before the register and ownership of this boat went on record, to show the further objection as grounds for your Honor's ruling.

THE COMMISSIONER: I will not pass on the second objection. If the former ruling is not correct, it is error; I don't think there is any doubt about that. Same ruling and exception.

MR. CHRISTENSEN: That is all, Captain. Recall Mr. Wood. With reference to the previous offer as to what Mr. Wood would testify, I offer the questions and answers on the following offer of proof, and each and every question as a distinct offer of proof, and the answer thereto.

THE COURT: Same ruling and you may have an exception.

LEONARD WOOD,

having been previously sworn, was recalled and testified further as follows:

DIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q You testified, Mr. Wood, before this morning, didn't you?

(Testimony of Leonard Wood)

A Yes, sir.

MR. CHRISTENSEN: I now offer to prove by this witness that he would identify the pictures marked Respondent's Exhibits 1, 2 and 3, which bear the stamp: "Filed December 14, 1929, R. S. Zimmerman, Clerk, by B. B. Hanson, Deputy Clerk." The same being exhibits taken from the file in the case of United States vs. The Motor Boat "Seal" No. 3488-J; that he would identify those pictures as pictures of "The Seal." Secondly, I offer to prove by this witness that his occupation during the months of July, August and September, 1928, was to check all boats in the private harbor of the Los Angeles Ship Yards at San Pedro, California, and to check all service charges on boats that lay in the pond; also to make bills and collect bills from such boats. I next offer to prove that in connection with his duty it was not only his duty to check all boats in the pond, but when they arrived and when they left the pond. That the check of the pond was made twice daily, at 9 o'clock in the morning and 4 o'clock in the afternoon; that he kept a record of the boats indicating when they arrived and when they left; that I will prove by this witness that "The Seal" was in the pond of the Los Angeles Ship Company, its yards, on various dates from June 22nd to September 5, 1928. I will prove by this witness that he would identify the Respondent's Exhibit No. 6 in said case of United States vs. "The Seal" heretofore identified, and would testify that said exhibit was a record on the boat "The Seal", for June, July and August, of the time of arrival in the pond and the time of leaving the pond. I will further prove by this witness that the boat "The Seal", with the

(Testimony of Leonard Wood)

exception of an occasion one day, which I believe was either the month of July or August, was always in the harbor at Los Angeles, or at the Los Angeles Ship Yards. I think that is all, and I will also offer in evidence on those offers of proof, the exhibits I have heretofore identified, so I may have separate rulings on that.

THE COMMISSIONER: Same objection, I presume?

MR. BALTER: Same objection your Honor.

THE COMMISSIONER: Same ruling and exception.

MR. CHRISTENSEN: I think that is all. I will then offer to prove—

THE COMMISSIONER: Do you wish to excuse this witness?

MR. CHRISTENSEN: Yes—by the master or rather the registered owner of the boat, Dan J. Clark, and by—

MR. SOMERS: Referring to what boat, Mr. Christensen, please.

MR. CHRISTENSEN: "The Seal."

MR. BALTER: Is that man here?

MR. CHRISTENSEN: That Government Exhibit No. 8 from the files of the case of the United States vs. "The Seal", heretofore identified, was at Catalina Island—

THE COMMISSIONER: Have you got that witness here?

MR. CHRISTENSEN: He is under subpoena. Will you see if he is outside? (Addressing Mr. Daniels.) There were some here yesterday that weren't here this morning.

THE COMMISSIONER: All right.

MR. CHRISTENSEN: If he isn't I can have him, because he is under subpoena.

(Testimony of Leonard Wood)

THE COMMISSIONER: If he was subpoenaed he is here. He was here yesterday.

MR. CHRISTENSEN: I may as well file the subpoena.

MR DANIELS: Mr. Clark isn't there.

MR. BALTER: We will object to the offer of proof on the ground the witness isn't here.

THE COMMISSIONER: If he was subpoenaed and appeared yesterday, he is still available.

MR. CHRISTENSEN: Yes. Mr. Curwin did not appear though, so I cannot make any offer with reference to him. This Exhibit No. 8 from that case I have identified is the order for his boat, and indicates the payment of the amount for the use of the boat "The Seal" on the 17th and 18th days of July, 1928. And I will offer to prove that this witness was also acting as the captain of said "Seal" and was so acting during the months of July and August on all voyages of the boat; that it made no voyages when he was not present; that he would testify that "The Seal" neither in the months of July or August made any trips to a place approximately 40 miles west of San Diego, or that it at any time loaded any liquor from any vessel called the "L'Aquila" or the "Przemsyl."

I will offer to prove by the witness Homer H. Evans—

MR. SOMERS: We make the same objection as to the offer of proof of the witness Clark.

MR. CHRISTENSEN: It may be understood that the objection and rulings and exceptions are the same?

THE COMMISSIONER: Yes.

MR. SOMERS: The witness last named is in attendance.

(Testimony of Homer H. Evans)

MR. CHRISTENSEN: All right. I am going to call him on something else, too. By the witness Homer H. Evans I will prove that he is superintendent of Fellows & Stewart Ship Yards, located at Wilmington, California.

MR. SOMERS: Object to anything further along this line of the offer since the witness is in attendance and may be interrogated.

HOMER H. EVANS,

called on behalf of the claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q What is your name?

A Homer H. Evans.

Q What is your business?

A Superintendent of the Fellows & Stewart Ship Yard Company.

Q That was your position in July and August, 1928?

A Yes, sir.

Q Also September of 1928?

A. Yes, sir.

Q Are you familiar with the motor boat known as "The Seal"?

A Yes, sir.

MR. SOMERS: The same objection, your Honor, to any reference to "The Seal" in this case, that has heretofore been made.

MR. CHRISTENSEN: I will offer to prove by this witness, if the court please, that the boat "Seal" as appearing from the exhibits heretofore offered in evidence,

(Testimony of Homer H. Evans)

Respondent's Exhibits 1, 2 and 3 in this case of the United States vs. "The Seal", heretofore identified, that this witness would identify those pictures, and he would testify that that boat was built by Fellows & Stewart, and that he was the witness who identified those particular exhibits in the case against "The Seal." I offer further to show that he would testify that "The Seal" was about 50 feet long and 10 feet wide and about 36 inch draft, and is a general cruiser type of boat, and that "The Seal" was launched—I will separately offer to prove that "The Seal" was launched by him on the 6th day of June, 1928; that the color of the boat was gray. I further offer to prove that "The Seal" went out on June 26th and came back into their ship yard on July 1st; that he will testify to the work done on the boat during the month of July and also the work done on the boat in the month of August; that from the pictures he would show the pilot house was changed. (Mr. Christensen consults with the witness.)

MR. CHRISTENSEN: This is getting into rather detailed testimony that it is pretty hard to get.

THE COMMISSIONER: Don't go into details on the offer of proof.

MR. CHRISTENSEN: Well, it is necessary because this man described it.

THE COMMISSIONER: It is only necessary to make an offer of proof now sufficient to show the character of the evidence and to indicate what it is only to such extent that it can be determined whether it is relevant.

(Testimony of Homer H. Evans)

MR. CHRISTENSEN: All right. We will offer to prove that certain changes in the structure of the boat were made in the month of July, with reference to the location of the pilot house, the same being moved from the front to about the center of the boat; also that on August 15, the lettering on the boat was changed to the stern of the boat, and that thereafter no lettering appeared on the sides of the boat. That from the testimony of this witness we would further prove and account for the location of the boat at all times and places unaccounted for by the other witnesses during the months of July and August, and until the middle of September."

THE COMMISSIONER: Same objection?

MR. SOMERS: Same objection.

THE COMMISSIONER: Same ruling and exception.

Q BY MR. CHRISTENSEN: Now Mr. Evans, are you familiar with the boat "Rethaluleu"?

A Yes.

Q The hull of that boat was built by your concern?

A Yes, sir.

Q And you have your records with you, and time sheets with reference to the work that was done in building the hull?

A Just the months of July and August.

Q July and August, that is what I mean. You had looked at these records, have you recently?

A Yes, sir.

Q And how was the boat—how were you paid as the work progressed on that boat?

MR. BALTER: That is objected to as being immaterial, incompetent and irrelevant.

(Testimony of Homer H. Evans)

MR. CHRISTENSEN: Oh, it is preliminary.

MR. BALTER: I don't see what difference it makes how they were paid.

MR. SOMERS: The contract in evidence states the times of payment, your Honor.

MR. CHRISTENSEN: All right.

Q The money under the contract to build that boat wasn't paid all at one time, was it?

A No, sir.

Q It was paid on various dates?

A Yes, sir.

Q And when was the last work done on the hull to your knowledge?

A August 14th.

Q 1928?

A Yes, sir, 1928.

Q You had nothing to do with the embedding of the engine in the hull?

A No, sir.

Q Had nothing to do with the placement of the engine in the hull?

A Well, I put the engine beds in.

Q I mean of equipping it with its motor power.

A No, sir.

Q And the electrical fixtures and equipment; your company had nothing to do with that?

A No.

Q And you know of your own knowledge then that that boat was on the ways or in the sheds at your company down until the 14th day of August, 1928?

(Testimony of Homer H. Evans)

A It was there in the yard or in the water at our place.

Q At your place?

A Yes.

Q How long after that was it there, do you know?

A. I don't know.

Q What you are testifying to here is based upon your refreshing your recollection from your own time sheets and records kept in connection with the work that went along on that boat?

A Yes, sir.

MR. CHRISTENSEN: That is all.

CROSS EXAMINATION

BY MR. SOMERS:

Q Mr. Evans, have you any interest in the boat?

A No, sir.

Q Did you ever have any interest in the boat? By that I mean a share in the boat or a property interest in the boat.

A No, sir.

Q Do you recognize the signature appearing on Libelant's Exhibit No. 10; the signatures, I should say?

A Yes, I recognize Mr. Stewart's signature, and this man signed this in my presence.

Q The name J. H. Curwin" was signed in your presence?

A Yes, sir.

Q What does Mr. Curwin look like; describe him, please.

A A man just about your build, excepting he is light complexioned.

(Testimony of Homer H. Evans)

Q Did he wear glasses?

MR. CHRISTENSEN: Objected to as not proper cross examination, if the court please.

THE COMMISSIONER: Overruled.

MR. CHRISTENSEN: Exception.

A No, he didn't wear glasses.

Q You talked with him on numerous occasions?

A Yes, sir.

Q Was he a sea-faring man?

A Not to my knowledge.

MR. CHRISTENSEN: May the record show that counsel is of a height of approximately six feet tall and angular.

MR. SOMERS: I think that can be corrected, specifically five feet eight and one half inches.

MR. BALTER: Object to the use of the word "Angular."

MR. SOMERS: I don't think it ought to be made a matter of record, your Honor.

THE COURT: Overruled.

MR. CHRISTENSEN: My only thought was that we want to get the entire benefit from his description.

THE COMMISSIONER: Perhaps the court will take judicial notice of Mr. Somers' build.

MR. SOMERS: I think counsel will stipulate I am not the Lincolnesque type.

Q BY MR. SOMERS: Did you answer my question whether he was a seafaring man or not?

A Not to my knowledge.

Q In your conversation with him did he outline to you

(Testimony of Homer H. Evans)

the requirements of his vessel; what stresses his hull should be able to withstand?

A No.

Q What did he say in that regard?

A He wanted a high speed boat; he was going to put three Liberty motors in the same and wanted to carry about 1500 or 1800 gallons of gasoline.

Q For what purpose did he tell you the boat was to be used?

MR. CHRISTENSEN: That is objected to if the court please as hearsay and not proper cross examination.

THE COMMISSIONER: Overruled.

A He didn't say.

THE COMMISSIONER: Does it appear that this man was the registered owner—

MR. SOMERS: The first registered owner.

THE COMMISSIONER: —in the period covered by your libel and amended libel?

MR. BALTER: Yes.

THE COMMISSIONER: All right.

Q BY MR. SOMERS: How many times did you see him?

A Oh, I saw him probably a dozen times.

Q When did you see him last?

A When the boat was finished.

Q Are you able to swear that you haven't seen him since?

A Yes, sir.

Q And you do so swear?

A I do so swear.

(Testimony of Homer H. Evans)

Q What address did he give you at the time he had his contract with you regarding building this boat?

A I don't think he ever gave me an address.

Q Did you ever have any occasion to communicate with him as to the progress of the boat?

A No.

Q He kept in pretty close touch himself with it?

A Yes.

Q Did he indicate the necessity for having the boat finished at a certain date?

A No.

Q Did he bring persons with him to inspect the boat as progress was made?

A Yes, he had a captain that was going on the boat.

Q And who was he?

A John McCluskey.

Q Did he tell you what McCluskey's connection with the boat would be?

MR. CHRISTENSEN: That is objected to.

A I don't know as he did.

MR. CHRISTENSEN: It is not pertinent to the cross examination. The only thing I inquired of this witness was not about any persons at all; simply about his company's work on that boat and when they finished.

MR. SOMERS: I think the matter of the building of the boat, your Honor, opened this line of inquiry.

MR. CHRISTENSEN: Not by whom it was built or by whom it was paid for, but what they themselves did in connection with the boat.

THE COMMISSIONER: Overruled.

MR. CHRISTENSEN: Exception.

(Testimony of Homer H. Evans)

Q BY MR. SOMERS: You did not appear with these men at the Customs House on July 27, 1928, at the time the ownership oath was taken and the Master's oath was taken, did you?

A I can't remember whether I did or not; it doesn't seem like I was.

Q When did you personally learn that John McCluskey was Master of the "Rethaluleu"?

A Why, about the time she was finished.

Q What inquiries did you make, if you did make an inquiry, regarding the reputation of J. H. Curwin?

A I didn't make any.

Q And under his contract he was obligated to pay your company something in excess of $5000?

A Yes.

Q Is that the ordinary way your company does business?

A Yes, sir.

Q The usual manner?

A Yes, sir.

Q Did you know at the time the Master was put on this vessel, Johny McCluskey, did you know Johny McCluskey's reputation as a law abiding citizen at the time he was made Master of the "Rethaluleu?"

MR. CHRISTENSEN: Objected to as not proper cross examination, and incompetent, irrelevant and immaterial.

THE COMMISSIONER: Incompetent, I believe.

MR. SOMERS: My only observation on that point, your Honor, is to establish the reputation of the vessel by the persons who were on board and in charge.

(Testimony of Homer H. Evans)

MR. CHRISTENSEN: That is not cross examination as far as this witness is concerned.

THE COMMISSIONER: Objection sustained.

Q BY MR. SOMERS: Now it appears from the testimony, Mr. Evans, that Ward Daniels was the subsequent owner of this vessel. Have you seen Ward Daniels in your yards in connection with this vessel?

A Never, until day before yesterday.

Q He did not consult with you as to whether or not this boat would be a good buy?

A No, sir.

Q I think that you have stated in your testimony that your last connection with the boat was on August 14, 1928. Are you so definite as to that point that it might not have been the 16th of August?

A Well, I was referring to my records. I think the records give the 14th of August.

Q If your billing would show the 18th, would that be the last day of work on the vessel or merely the date of billing?

A It might just show the date of billing. That might not be the actual work.

Q. After the boat left the ways, did it or did it not return to your yards?

A I don't know. It seems to me that it never came back after it left there, after it was finished.

Q Curwin never came back to make any complaint that he got a bum boat?

A No.

MR. SOMERS: I think I ought to strike that out, your Honor; "poor".

(Testimony of Homer H. Evans)

Q Referring to the depositions which have been received in evidence, and on the last page thereof, the top picture, opposite which is the Figure 1, there is a front view and profile view of a man. I ask you if you recognize that man.

A Which one; this one? Yes, I know him; that is John McCluskey, as I know him.

Q And you have placed your figure on another picture; who is that?

A These two are the same man.

Q Referring to the profile and the front view of the pictures—

MR. CHRISTENSEN: Just a moment if the court please. I move to strike that; move to strike the previous question and answer because the same is not pertinent to any fact elicited or developed on direct examination.

THE COMMISSIONER: Well, you covered period during the time the contract was made until the boat was finished, and it was done during that time. Persons whom he saw about it would have some bearing on it. Overruled.

MR. SOMERS: Q Directing your attention to the two pictures opposite which is the number two, I will ask you if you can identify the party there depicted.

A Yes, George Garvin.

MR. CHRISTENSEN: I now make a similar motion, if the court please, as there is no connection between the individual identified and anything with reference to the construction of the hull of the boat.

THE COMMISSIONER: Denied.

MR. CHRISTENSEN: Exception.

(Testimony of Homer H. Evans)

Q BY MR. SOMERS: Directing your attention to the last picture on the page opposite the number three, I ask you if you identify the person there depicted?

A No, I cannot. I never saw him.

Q Was George Garvin ever known to you under the name of J. H. Curwin?

A No, sir.

MR. SOMERS: That will be all, your Honor with this witness.

REDIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q The firm with which you work is one of the largest ship building concerns at the harbor, isn't it?

A Yes.

Q Your position with it is what?

A Superintendent.

MR. CHRISTENSEN: That is all.

Q BY MR. CHRISTENSEN: I believe I asked if you had your records and so forth that you had refreshed your mind from here present in court?

A Yes, sir.

MR. CHRISTENSEN: That is all.

RECROSS EXAMINATION

BY MR. SOMERS:

Q I think you stated you were superintendent of the works. Are you not superintendent of construction?

A Yes, sir.

Q At the yards?

A At the yards.

(Testimony of Homer H. Evans)

REDIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q The lettering on the stern of the boat, did you see that?

A What boat?

Q The "Rethaluleu"?

A Yes, sir.

Q And the size of the lettering was what; was it rather large size lettering?

A I would say about five inches.

Q I hand you an exhibit here and ask you if that is the boat, if that is the "Rethaluleu".

A I think it is.

Q You are not certain about it?

A I am not positive about it. I think it is.

MR. CHRISTENSEN: Will you mark this?

MR. SOMERS: I think counsel ought to lay the foundation for his picture.

THE COMMISSIONER: For identification; you are not offering it?

MR. CHRISTENSEN: No, not yet.

(Picture marked Respondent's Exhibit B for identification.)

Q BY MR. CHRISTENSEN: Looking at the next picture I hand you, "C" for identification, and I will ask you whether or not you can identify that picture?

A Yes.

Q That is a picture of the—

A "Rethaluleu."

Q Does that represent the "Rethaluleu as it was at the time you saw it in your yards; last saw it?

(Testimony of Homer H. Evans)

A To my knowledge it is.

Q And in the month of August?

A Yes.

Q You don't know of your own knowledge whether or not that boat left the yards in August or September, do you?

A No, sir. I do not.

(Second picture marked Respondent's Exhibit "C".)

Q Now, the Exhibit B for identification; you said you were not certain whether that was the "Rethaluleu" or not, is that correct?

A It is.

Q In other words, you have seen a number of boats of that type and build?

A After examining this picture I can identify it as the "Rethaluleu."

Q And that is as it was at the time substantially?

A To my knowledge, it is.

Q When you saw it last in August, 1928, at your ship yards?

A Yes.

MR. CHRISTENSEN: That is all.

RECROSS EXAMINATION

BY MR. SOMERS:

Q You have had occasion, Mr. Evans, to see boats that have been condemned by the United States Government for illegal ventures in contravention of the customs and revenue laws of the United States, have you not?

MR. CHRISTENSEN: Just a minute. That question is compound. It is assuming something not in evidence and incompetent, irrelevant and immaterial.

(Testimony of Homer H. Evans)

THE COURT: Let him finish his question.

MR. CHRISTENSEN: I thought he had finished.

MR. SOMERS: Q Have you not?

MR. CHRISTENSEN: I assumed he had.

THE COMMISSIONER: You can take a yes or no answer, whether or not he is familiar with it; he means boats engaged for smuggling liquor.

MR. SOMERS: Yes, your Honor; that is the point to which my question is directed.

Q You have seen a great many yachts and motor boats that have been tied up by the Government and confiscated and sold for violation of the laws of the United States, have you not?

A Well, a few.

MR. CHRISTENSEN: Just a minute. I haven't had an opportunity to interpose an objection, and at this time move to strike the answer, until I can have that opportunity.

THE COMMISSIONER: Well, he can answer it yes or no whether he has seen any such boats.

MR. CHRISTENSEN: It is assuming that he knows that such boats were—

THE COMMISSIONER: He may answer yes or no as to whether or not he is familiar with them.

MR. CHRISTENSEN: Exception.

Q BY MR. SOMERS: Do you recognize the locality depicted in these exhibits, what portion of the harbor is shown in these pictures?

A Sub-base of the Coast Guard.

MR. CHRISTENSEN: I stipulate these pictures were taken down at the Sub-base where the boat now is tied up, if that is what you want to prove.

(Testimony of Homer H. Evans)

Q BY MR. SOMERS: Directing your attention to the measurement, size, cargo space, the fact that she carried a dory—by the way, is this boat equipped with sleeping accommodations?

A Yes, she had sleeping accommodations in the front.

Q Of what do they consist?

A I couldn't say whether there was just enough for two men or four.

Q That it had sleeping accommodations, carried a large supply of fuel—are you able to say whether or not the boat that I have just described, the "Rethaluleu", is of the same class and character of those boats most frequently seen tied up under seizure and later condemned and forfeited?

MR. CHRISTENSEN: Just a moment. That question is objected to as compound, unintelligible, and calling for the conclusion of the witness, and there appears in there matters not in evidence; it is incompetent, irrelevant and immaterial and not proper cross examination.

THE COMMISSIONER: It is not proper cross examination. The objection will be sustained on that ground.

MR. SOMERS: May I endeavor to frame one more question along this line?

THE COMMISSIONER: Yes.

MR. SOMERS: I will try to shorten it considerably.

Q BY MR. SOMERS: The boat shown on that picture is of the same character as boats which you have frequently seen at the harbor, against which condemnation proceedings have been held?

(Testimony of Homer H. Evans)

THE COMMISSIONER: Ask him whether he is familiar with the type of boats used in smuggling liquor.

MR. SOMERS: Thank your Honor for the suggestion.

Q Are you familiar with the type of boats used in smuggling liquor?

MR. CHRISTENSEN: That is also objected to on the ground heretofore stated.

THE COMMISSIONER: I will take a yes or no answer to that. He may answer yes or no.

A Well, to my knowledge, I don't know any boats that smuggle liquor, except from hearsay.

Q You have seen them tied up in the base down there after the court has entered its decree that it is a rum boat and the ship shall be forfeited?

A Yes, I have.

Q You take the decree of the United States District Court on that matter?

A Yes.

Q Is the "Rethaluleu" of the same appearance?

MR. CHRISTENSEN: Just a minute. I move to strike the two previous questions and answers on the ground heretofore stated as to the two previous, on the questions immediately preceding those. May I have a ruling on that?

THE COMMISSIONER: Well, if you are going to object to this question, that objection may be sustained. The other is preliminary.

MR. SOMERS: That will be all, your Honor.

MR. CHRISTENSEN: That is all, Mr. Evans.

(Whereupon an adjournment was had until 2 o'clock.)

(Testimony of Homer H. Evans)

AFTERNOON SESSION

2:15 P. M.

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MR. SOMERS: I take it, your Honor, the rule is still in force?

THE COMMISSIONER: Yes.

MR. SOMERS: The witnesses under the rule will have to withdraw.

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FRANK L. MORSE

called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q What is your name?

A Frank L. Morse.

Q What is your occupation?

A Building Marine Engines.

Q How long have you been in that business?

A About 4 years.

Q Where?

A At Wilmington.

Q You were in such business during the months of July, August and September, 1928?

A Yes, sir.

Q I direct your attention to Claimant's Exhibits B and C and ask you if you had anything to do with the installation of the engines in the boat represented on those exhibits B and C.

(Testimony of Frank L. Morse)

A Yes, I think I did. I think I recognize the boat.

Q Is that the "Rethaluleu"?

A If the name is the "Rethaluleu;" we always knew it around the shop as the "Three Liberty Job".

Q You furnished some of the supplies and materials?

A Yes, sir, I did.

Q And engine parts for the installation?

A Yes, sir.

Q You also had one of your own mechanics working on the installation?

A Yes, sir.

Q There was another mechanic working on it?

A Yes, sir, not in my employ.

Q There were two mechanics working on the installation of the engine?

A Yes, sir.

Q Have you any recollection as to the date the work of the installation commenced?

A No, I don't. Seems to me it was some time during July; probably the middle or latter part of the month.

Q Do you remember whether or not you commenced the installation at the time of the completion of the hull?

A Well, yes, the hull had to be practically finished before we could start to install the motors. We could not start in to install the motors until the hull was finished. Then we started installation of the engines.

Q You did not have complete charge of the installation?

A No, not at all, we did not have. I furnished a mechanic who was to work under the supervision of the man who had charge of the installation, that was all.

(Testimony of Frank L. Morse)

Q And then the parts?

A Yes, we furnished parts.

Q Let me ask you a question: Did anything transpire recently by which you had occasion to make reference to any records you had in your office down there, to determine when it was you did your last work on that boat?

A Yes, sir.

Q When was that?

A Well, it was about, I think about last Tuesday or Wednesday of last week; about a week ago.

Q What was that circumstance?

A Mr. Dresser was in and asked me about the boat and the engines. He wanted to know if I had anything to do with it, and I told him I did, and then after he was gone the next day I got to thinking about it and wondered if the information was correct, and I was trying to find in my record something about it, but I couldn't find anything in the job cards or invoices or anything of that kind, anything definite about it, except it was some time during August, 1928. That is about all the information I could get.

Q Let me ask you, the last work or supplies that were furnished on that boat, was that not on the 1st day of September, 1928?

MR. BALTER: Object to that as being leading, your Honor. If they have records let them produce the records to show when the boat was built.

MR. CHRISTENSEN: That is secondary evidence. His testimony directly is the best.

(Testimony of Frank L. Morse)

MR. BALTER: I don't know. I think it would be the best way if they had records.

MR. CHRISTENSEN: It is not.

MR. BALTER: This man isn't sure of the boat; says the "Three Liberty Job". They must have a record of the work done on the boat under the exact name of the boat and the exact time.

THE COMMISSIONER: Let me have the question.

(Question read.)

MR. BALTER: That is objected to primarily as being leading.

MR. CHRISTENSEN: Reframe the question.

MR. BALTER: Objected to on the further ground that records ought to be produced if they have the records.

THE COMMISSIONER: If he has a recollection, he may testify from his recollection.

MR. CHRISTENSEN: Q Mr. Morse, after you refreshed your recollection after Mr. Dresser visited you, are you prepared to say now when you received your last two payments in connection with the work done of the "Rethaluleu"?

A Well, yes, I can.

Q On what dates?

A The only information in my cash book, it shows a payment on August 11th of $600—

THE COMMISSIONER: You are not answering the question. The question is this: As to whether you have an independent recollection of when the last work was done on the boat. Do you have such recollection now?

A Well, it was in August, 1928.

(Testimony of Frank L. Morse)

Q BY MR. CHRISTENSEN: And have you any recollection as to when you received the payments?

MR. BALTER: That is objected to as being immaterial. We are not interested in when the payments were made. They may have been made several months later.

MR. CHRISTENSEN: I am going to tie it up.

MR. BALTER: Let's get down to the payment.

MR. CHRISTENSEN: I must first ask about the one before I get to the other.

THE COMMISSIONER: It does not appear to be material, his recollection what was done; sustained.

Q BY MR. CHRISTENSEN: Well, from your recollection of your books, did you discover when the payments were made for work and materials in the month of August, 1928 and the month of September?

A When the payment was made? Yes, I know when the payment was made.

Q And after having so refreshed your recollection as to the time of the payment, are you now able to say on what dates you received payment for labor and material?

MR. SOMERS: Same objection as to materiality, your Honor; entirely immaterial when they received payments.

MR. CHRISTENSEN: I haven't got to that yet.

MR. BALTER: Well, we will take each question at a time.

THE COMMISSIONER: Sustained.

Q BY MR. CHRISTENSEN: With reference to the date that you discovered on your cash book as to the time you received payment for labor and material, have you a recollection now as to how late in August it was

(Testimony of Frank L. Morse)

that the last work and material were furnished for the work on the "Rethaluleu"?

A The work ran through almost to the 1st of September.

(Question read.)

THE COMMISSIONER: The question is whether you have a recollection or not. Do you remember?

A The way I remember, this is apparently a cash transaction. If they got material, within the next day or two they came in with the money. That is how I hook up. If I got the money the last of August, I furnished the material a few days prior to that.

THE COMMISSIONER: This is the question, whether you have an independent recollection. You may have forgotten about the particular transaction or the particular time and afterward you have seen certain papers or certain memorandum; then that might refresh your recollection so you can remember. Now, the question is this, whether you, after having examined those books and studied these matters, whether you are able to remember when the last work was done?

A Oh, yes, sure.

Q You do remember?

A Yes.

Q BY MR. CHRISTENSEN: When was that?

A That was in August.

Q With reference to the 1st of September, how close to the first of September?

MR. SOMERS: I don't think that is material. He has testified it was in August. He can't by leading question now, change his testimony that it was in September.

(Testimony of Frank L. Morse)

MR. CHRISTENSEN: There is no attempt to change anybody's testimony. The witness has already answered.

A The latter part of the month.

Q By the latter part of the month, tell us, Mr. Morse, what you mean.

A Well, we will say up to the 20th, I can't say the exact date; maybe as late as the 25th, something like that. I could go ahead and explain this thing.

Q You may explain your answer.

A Well, here was the idea, you see this boat, when you install engines in this boat or any other boat, the boat is launched, and all you have to do is a certain amount of tuning and a certain amount of work, and where maybe the carpenters are not exactly correct, you have to change it, and I was talking with the fellows in the shop and I recall that on this particular boat we had a lot of trouble with the gasoline supply. Three engines in the boat was rather unusual, and we had trouble pumping gasoline to the engines and as I remember we worked for a couple of weeks; and we were experimenting at the time with what is known as auto pulse, and we had to buy additional auto pulses and put on, and then we went over to, I think, Gavins to see about getting a generator driven gasoline pump put on. Those pumps, as I recall, we were going to put on three, they were quite expensive; they cost around $135 a piece as I remember, and that was an item that came in late in August.

Q Now, Mr. Morse, let me ask this question, you have had a good deal to do with the installation of motors in motor boats?

A Yes, sir.

(Testimony of Frank L. Morse)

Q These were Liberty motors?

A Yes, sir.

Q You have installed Liberty motors in numerous boats?

A Yes, sir.

Q Now, Mr. Morse, assuming that a boat is built, that a hull was built of a length of 58 feet, and a breadth of 11.90 feet and a depth of 5.80 feet, with a capacity under tonnage deck of 23.52 tons, which hull was to be motored, or rather powered by three Liberty motors, have you, Mr. Morse, an opinion as to the length of time it would take to properly install the three Liberty motors, and power the boat for use?

MR. BALTER: That is objected to on the ground there is no occasion for a hypothetical question. This gentleman has testified he built this particular boat. Let him testify how long it took him. Why should we go into conjecture in a hypothetical question?

MR. CHRISTENSEN: There is something entirely different in my mind.

THE COMMISSIONER: I don't know what is in your mind.

MR. SOMERS: The question has been asked and answered.

THE COMMISSIONER: It is not a matter that calls for opinion evidence.

MR. CHRISTENSEN: I am going to offer to prove to them by this witness as an expert that this particular boat,—that he would answer this hypothetical question and his answer to the following question, "How long would it take," would be one month and a half.

(Testimony of Frank L. Morse)

MR. BALTER: Let the record show our objection to that question.

MR. CHRISTENSEN: And that to power and equip the boat such as a boat like the "Rethaluleu", of that description, from the facts I have stated, with three Liberty motors, as the boat was also equipped, that his answer would be that it would take a month and a half. Added to the question will also be with two mechanics working on the boat installing the engines.

THE COMMISSIONER: It is not a question of what his opinion would be. He is the man that installed the motors. The question is how long it took to install the motors, as I understand it.

MR. CHRISTENSEN: I think the testimony has been as far as Mr. Morse is concerned, that he himself did not install the motors, but he did furnish a mechanic and furnished supplies and materials for the installation, but not that he had any contract to complete the installation or that he did complete the installation.

MR. BALTER: If that is the situation, we move to strike all the testimony of the witness on the ground he does not know anything about the "Rethaluleu" or what was done.

MR. CHRISTENSEN: That is absurd.

MR. BALTER: That is as to just which one you will take. Either this witness knows or does not know what he was talking about. If he knows about the "Rethaluleu", then this hypothetical question is out; if you want the hypothetical question, the testimony should be stricken out.

(Testimony of Frank L. Morse)

THE COMMISSIONER: Let us not take that up now. Objection sustained.

MR. CHRISTENSEN: I will state the purpose. I will offer this witness to testify directly and specifically to facts within his knowledge in so far as he had any contact with the work and labor and materials supplied to the "Rethaluleu" at the time it was constructed. Now, I offer it not in connection with the actual work, but as an expert. We have testimony in the record as to the time the hull was completed in this case. He stopped short at a point of actually the boat being completed. He didn't have that contract and it is not his testimony, but I am going to offer by an expert testimony that it takes at least six weeks to complete the boat, and taking the time as the 14th of August as to when the hull was completed, that brings it down to the 1st of October, and I have a right to prove a fact by that hypothetical question, as to how long it takes, when we first have a fact to which to tie the expert opinion.

THE COMMISSIONER: I don't believe it is a proper subject matter for expert testimony, opinion testimony; objection sustained.

A I can explain about that—

MR. SOMERS: Object to any voluntary statement, your Honor.

THE COMMISSIONER: You can't explain.

Q BY MR. CHRISTENSEN: Let me ask this question: Are you, from your experience as a marine engineer, able to say how many weeks it would take, or how long a time it would take, with two mechanics working on the installation of three Liberty motors such as

(Testimony of Frank L. Morse)

were being installed on the boat "Rethaluleu", that you saw, and upon which you worked, how long would it take to power, to install those motors and power that boat for use?

MR. BALTER: Same objection, your Honor, please.

THE COURT: Same ruling.

MR. CHRISTENSEN: Exception. May I have exception to both rulings?

THE COMMISSIONER: Yes.

MR. CHRISTENSEN: That is all.

CROSS EXAMINATION

BY MR. SOMERS:

Q Mr. Morse, in dealing with the installation of motors for the "Rethaluleu", whom did you meet?

A Well, the transaction started of course, sometime before the installation, when a mechanic came in to see me, and he had built up a motor for this boat—

Q What was his name?

A Walter.

Q Walter what?

A All I knew him by was Walter. He didn't work for me and had no connection with my business. He had as I understood it, a shop, and he was going to sell these people the engine. He had another motor and he wanted to get parts from me to complete it, and I saw a chance to possibly sell an engine by refusing to sell him the parts, so I told him I wouldn't sell him any parts; I would sell him a complete motor. Then he later told me he had talked with the people that he was trying to do business with and they thought that this man, whoever it was, that Walter was figuring with, was going to put

(Testimony of Frank L. Morse)

three engines in, so he said, "I will give you an order for new motors, and the one I have built I want you to test it on your stand;" and while the work was being done on the boat, we, in our shop, were getting this engine ready and Walter later brought this party in there. I wouldn't let the motors go out of the shop until they were paid for. I insisted on cash. He brought this party in there and paid for the motors and I thought that was the end of the transaction. I didn't know I had anything further to do with him, and then Walter came over and said he was afraid it was going to be too tough a job to install these motors himself and said, "Can I borrow one of your mechanics?" I said, "I guess so, we are not so terribly busy," and I sent one of the mechanics over to help this fellow Walter working under his supervision, and Walter said, "I will pay him $1.50 an hour for his time." There was certain material, like buying the auto pulses and gas pump and pipe and hose and other things that go into installing a motor, and we had that and so Walter said he would buy that from me.

Q Was the work done in your shop or in Walter's shop?

A Two engines were built in my shop and another one was built in Mr. Walter's shop.

Q Were they installed in your shop?

A No, they were installed in Fellows & Stewart's yard in Wilmington.

Q How long had you known Walter prior to the time he approached you on this deal?

(Testimony of Frank L. Morse)

A I had never known him intimately, except he was a mechanic around the waterfront and did work on engines.

Q With what house was he connected?

A Just for himself.

Q Did he have a recognized place of business?

A Not that I know of.

Q Did he carry his tools around with him?

A Carried a kit of tools around when he was working on a boat, and things of that kind. That is not unusual. There are several mechanics doing that around.

MR. SOMERS: I didn't ask for that.

Q With what address would you communicate when it was necessary to confer with Walter?

A I didn't know where he was. I had no occasion to communicate with him.

Q You would have to wait for him to come to you?

A Yes.

Q What was the amount paid you for the motors that went into the "Rethaluleu"?

A I don't recall. We ordinarily get for a new engine around $3000, so I presume that was the price they paid for the new one, and Walter bought a conversaion for $1250.

Q Why did you refer to the installation on this boat as the "Three Liberty Motor Job"?

A Well, at the time we started building the engines, the boat was being built and had no name, and in the shop we mentioned about the engies for the "Three Liberty Job," the way we spoke of it.

(Testimony of Frank L. Morse)

Q In your experience as a boat builder, is it or is it not unusual for a motor boat the size of the "Rethaluleu" to be equipped with three Liberty motors?

MR. CHRISTENSEN: I object if the Court please. This is no place for a hypothetical question and is not pertinent cross examination.

MR. SOMERS: Supposed to be a marine expert that built this boat.

MR. BALTER: Calling for the knowledge of the witness, your Honor.

THE COMMISSIONER: Might go to his recollection. Overruled.

A No, it is not unusual.

Q BY MR. SOMERS: Have you built many boats —have you installed three Liberty motors on many boats of the size of the "Rethaluleu"?

A No, sir, we are trading with Mr. Meyers of Beverly Hills now to install four; Ben R. Meyers.

Q That is the only one which has more than two Liberty motors?

A We haven't turned it. Just figuring on the cost, whether we can do it; with the fellow that ran the Blue Moon.

Q Then the "Rethaluleu" is the only motor boat on which you have installed more than two motors?

A Yes, that is the only one.

Q And did you have any conversation with Walter as to the purpose for which the "Rethaluleu" was to be used?

A No, he didn't make any explanation and I didn't ask him.

(Testimony of Frank L. Morse)

Q Was your suspicion aroused in any way as to what purpose this boat was to be used for?

A No, I didn't give it any thought. I didn't see her.

Q What was the name of the mechanic that you furnished?

A Roy Lindley.

Q Did the owner of the boat ever visit your premises?

A Why, a man by the name of Curwin—that is I was told by Walter. There was a few days we were hung up there from delivering the engine until I got the money, and Walter says, "I will have Curwin come in and pay you." Then shortly after that, a day or two later—of course I say a day or two, but soon after I had the conversation, the party came in and turned over the money, I don't recall how much it was.

Q Had you seen Curwin before that time?

A No, I didn't know him in the transaction at all.

Q Have you seen him since?

A No. I have never seen any of them since the boat was finished, September.

Q I think you stated that the total cost of the motor was approximately $9000?

A Why, I wouldn't say that on this "Rethaluleu", no, because Walter built one motor himself. I don't know where he got the conversion of the engine, but one of them he built.

Q What money came into your hands?

A Conversion and engine. The engine possibly $3000 for the new engine, and the conversion would be about $1250.

(Testimony of Frank L. Morse)

Q BY MR. BALTER: You were paid cash and not by check?

A In cash.

MR. CHRISTENSEN: Just a minute. Let us find out about this unusual practice of two gentlemen cross examining. I object to it.

MR. BALTER: All right.

Q BY MR. SOMERS: What was the condition of the boat when you started work on it?

A Well, it was, you might say, finished ready for engines. You can't very well install engines in a boat when the carpenters and painters are working on it.

Q And the last record of a receipt of a payment is in August?

A Yes, August 11 and September 1st is the date on the cash book.

Q At the time of that receipt, the receipt of that money, closes your connection with the boat?

A It never came back to me for anything after that.

Q As far as were concerned, it was finished and out of your hands?

A Yes.

Q Over what period in August, from your knowledge of the boat, would it have been possible—was it possible to operate that boat; it was in an operative condition?

A No.

MR. CHRISTENSEN: I move the answer be stricken so that I may have an opportunity to object to the question, and let's see the question again.

MR. SOMERS: Strike it.

(Testimony of Frank L. Morse)

Q For what period in August was the boat in an operative condition?

MR. CHRISTENSEN: There is no evidence in the record that the boat was delivered in an operative condition during any period of August. He hasn't so testified or any other witness; assuming a fact not in evidence.

THE COMMISSIONER: Overruled.

MR. CHRISTENSEN: Exception.

A What is it you want to know?

THE COMMISSIONER: If the boat was capable of being operated.

A In the latter part of the month, as I recall, it was when we had the trouble with the gasoline. That was the last week or two in August, and that was about the additional auto pulse, so the boat had been taken out and run around the harbor when we discovered the engine wouldn't turn out—couldn't get revolutions out of it; when you got over 800 revolutions, it would go down to nothing, and that took some days of experimenting around to overcome that. While I say the boat was in the water and it would run, still it wasn't satisfactory.

Q Now, Mr. Morse, do you know of your own knowledge that it didn't go beyond the harbor, the confines of the harbor?

A I wasn't on the boat to know where it went or anything of that kind, but with that gasoline trouble it would be almost impossible to go anywhere with it.

Q You are not able to say that they didn't?

A No, I didn't go down and ride on it or anything of that kind. That is what I learned about it. Walter

(Testimony of Frank L. Morse)

came over and told me they were having trouble and we discussed it in the shop with the shop foreman as to how to overcome that difficulty, that the entine wouldn't turn up.

MR. SOMERS: That is all.

REDIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q On cross examination you testified that the last payment you received in connection with the "Rethaluleu" was September 1st?

A That is correct.

Q How much was that?

A $400.

Q What for?

A Well, that would just about cover the gasoline pumps auto pulse we put on it.

Q Was that a cash transaction?

A Oh, yes. Not knowing the people and not knowing his address or anything about him, I had to get cash, or it could disappear and I would never get the money.

Q You would get the cash before you gave up $1200 worth of parts?

A No, we took the parts down and I was right down to get the money. I would go down and say to Walter, "When are you going out"? And he said, "The boat won't be finished before several days yet." I says, "I must have that money; don't take the boat away from Fellows & Stewart until you have paid me, I want the money." If I didn't get the money I was going to get the gasoline pumps and take them back to the shop, so

(Testimony of Frank L. Morse)

he said, "I will have them come in," and it was around the 1st of September he came in and paid this. Then there was nothing more after that.

RECROSS EXAMINATION

BY MR. SOMERS:

Q Have you your cash book here?

A No, I didn't know you would want anything more.

Q You have now moved up the date in your testimony to the 1st of September. Prior to redirect examination the last date we had was August.

MR. CHRISTENSEN: Just a moment.

Q BY MR. SOMERS: (Continuing) Is your recollection refreshed from something independent of the questions of counsel for the Claimant?

MR. CHRISTENSEN: Just a minute. I submit that is an impertinent question. I was attempting to develop the evidence on direct and was foreclosed of getting the payments, and he asked the direct question on cross examination and brings out the fact that the payment was made on August 11 and another payment was around September 1st.

MR. SOMERS: If your Honor please, I refer to the record. I have mentioned no date specifically.

MR. CHRISTENSEN: The witness did.

A I stated at the very beginning when Mr. Dresser came in to see me, I looked at the record and said I could find two payments, one payment was on August 11 and another one September 1. I thought I brought that out in the very beginning. I intended to.

MR. CHRISTENSEN: What is the name of your son?

(Testimony of Frank L. Morse)

A Frank L. Morse, Jr.

Q Was he watchman on that boat?

A Yes, sir.

MR. SOMERS: Will you produce the records, Mr. Morse?

A Yes, I will cut that page out of that book that shows the payments.

MR. SOMERS: I would rather you would bring in the whole book.

MR. CHRISTENSEN: I don't think he is obliged to bring in the whole book as a legal proposition.

MR. SOMERS: I think the question may not be settled, necessarily be settled at this time, your Honor. May we have the last witness recalled for a matter overlooked?

(Frank L. Morse recalled for further examination in behalf of the Libelant.)

RECROSS EXAMINATION

BY MR. SOMERS:

Q I hand you the last page of the depositions, to which are attached 5 pictures and ask you,—No. 1, 2 and 3, the first number is two pictures and the second two pictures and the last one is one, and ask you if you recognize anybody on that page?

A I have seen this top fellow here around the boat yard.

Q Recognize him and call him by name?

A I think he was known as Johny. These other fellows I don't know; but I have seen him around. I have been over to the Los Angeles Ship Yards and over to Fellows & Stewart, and I have seen him around the

(Testimony of Frank L. Morse, Jr.)

various boat shops there and have heard them call him Johny.

Q You don't know or not whether he is in the same business as Walter?

A Well, I wouldn't say. I don't know anything about him.

Q When you pointed to the picture and said, "I know this fellow", you pointed to the man—

A Number 1.

Q At the top of the page?

A Yes.

REDIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q You say you have seen him around the boat yard of Fellows & Stewart and other boat yards around there?

A Yes, various places.

Q In a mechanical position?

A He was always in overalls, and maybe he was employed in the boat shops, I don't know.

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FRANK L. MORSE, JR.,

called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q What is your name?

A Frank Morse.

Q BY MR. SOMERS: May we inquire whether the witness was in the room in violation of the rule?

(Testimony of Frank L. Morse, Jr.)

MR. CHRISTENSEN: I sent for him after the other witnesses went out.

MR. SOMERS: Very well.

Q BY MR. CHRISTENSEN: Your name is Frank Morse?

A Yes, sir.

Q Where do you live?

A 5127 West 5th Street.

Q That is where; you mean here in the city?

A Los Angeles.

Q What was your position in the summer of 1928?

A I was working for my father.

Q You said you were working for your father; did you assume any other duties?

A Yes, sir.

Q What was that?

A Night watchman on the "Rethaluleu".

Q The pictures which I hand you, marked Claimant's Exhibits B and C, will you state whether or not those are pictures of the "Rethaluleu"?

A Yes, sir, the first one; that is it again.

Q That is the boat on which you were the night watchman?

A Yes, sir.

Q How much did you receive?

A $3 a night.

Q When did you go on that boat as night watchman?

A I couldn't tell exactly, but it was approximately July. I didn't keep any record, but I know sometime in the month of July.

(Testimony of Frank L. Morse, Jr.)

Q And how many weeks or months were you on it?

A Well, I didn't keep accurate track of that; Approximately 6 or 7 weeks.

Q And where was the boat when you went on it first as night watchman?

A Fellows & Stewart Ship Yard.

Q And you were on it, were you, every night after that?

A Well, every night until it went into the water.

Q And about when was it that you ceased being night watchman?

A Well I should say the month of August, I don't know exactly, but right around the middle I should say, of August.

Q The boat was not finished or motored entirely at the time you left as night watchman, was it?

MR. SOMERS: Object to that as leading.

A When I left the boat?

Q BY MR. CHRISTENSEN: Yes.

A Practically. There was very little left to be done.

Q Your best recollection is you were night watchman on it for 6 or 7 weeks?

A Yes, sir.

Q And you became watchman on it in July?

A Sometime in July.

Q You are not sure as to the time or what part of July; can you tell us that?

A I can't remember. It is too far back. I didn't keep a record at all.

Mr. CHRISTENSEN: That is all.

(Testimony of Frank L. Morse, Jr.)

CROSS EXAMINATION

BY MR. BALTER:

Q You say you got on the boat as night watchman while the boat was at Fellows & Stewart?

A Yes, sir.

Q Was that while the hull was being built?

A Yes.

Q Who employed you?

A A fellow named Walter.

Q He paid you?

A He paid me.

Q Why was it necessary to have a night watchman on it?

A They were scared somebody was liable to go aboard and steal parts and things off the boat.

Q Didn't Fellows & Stewart take care of that?

A There is a watchman in the yard, but he is in the office a lot; he isn't out watching.

Q They don't usually do that, do they?

A Seen it done many times.

Q With boats that are being built?

A Yes, sir.

Q Did you also act as watchman after the boat came over to your father's?

A Where?

Q Over to your father's place.

MR. CHRISTENSEN: Just a moment, object to that as not cross examination and assuming a fact not in evidence.

MR. BALTER: It is going to what this boy did on the boat.

(Testimony of Frank L. Morse, Jr.)

THE COMMISSIONER: There has been no testimony it was over at his father's place.

MR. BALTER: I will get around to it another way, then.

Q Where did this boat go to after it was built at Fellows & Stewart?

A I don't know. I got off the boat.

Q Do you know whether they did anything on the boat?

A Yes, there was somebody brought in a part of a motor and I think they built up a new one and then there was an overhaul.

Q An overhaul job? When you say overhaul job, that means there were motors in the boat already?

A No, there were no motors in the boat. This fellow Walters came in with this stuff to be built up.

Q What was the condition of the boat when you left it at Fellows & Stewart?

A The boat was practically done.

Q Were there any motors?

A Yes, Walters said there was just a little left to be done and he didn't need me any more.

Q Motors in the boat at that time?

A Three motors. They were in it when I left.

Q Motors already in it. It practically was ready to operate?

A Just about.

Q And that was no later than the middle of August, was it?

A Well, that is hard to remember. It could have been; it could have been pretty close to September.

(Testimony of Frank L. Morse, Jr.)

Q But, as far as you remember it was about the middle of August?

A Right along there. I couldn't say exactly because nothing happened or any special occasion to make me remember, but I should say it was right around that time.

REDIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q Calling your attention to Labor Day, which on that year, fell on the 3rd day of September; Monday the 3rd day of September. Will that fix in your mind as to the time it was; will that help you?

A I can remember a few days before Labor Day this fellow Walter came in with the money. He gave me about $50. I remember I went out and spent about half of it on Labor Day. That wasn't very long after I got off the boat.

Q Your father's place of business, that isn't on the waterfront, is it?

A No, sir, not right on it.

Q How many blocks away?

A Well the west basin, that is just down a couple of blocks; Fellows & Stewart's yards are probably about a mile, something like that.

MR. CHRISTENSEN: That is all.

RECROSS EXAMINATION

BY MR. BALTER:

Q When Walter paid you, that was sometime after you quit your service?

A Yes, a little—

MR. CHRISTENSEN: Objected to as assuming something not in evidence.

(Testimony of W. E. Dresser)

MR. BALTER: You just brought it out yourself.

MR. CHRISTENSEN: Not some time after; he didn't say that.

THE COMMISSIONER: It is cross examination; all right.

A Well, it wasn't very long after I got off.

Q Was it more than a week?

A It is pretty far back; that is a couple of years ago. I should say right around a week, or something like that. He came in and paid me the rest.

Q That was after you quit the boat?

A Yes, when I was off it.

MR. BALTER: That is all.

MR. CHRISTENSEN: That is all.

MR. SOMERS: The witness may leave the stand. We may want to recall him on another phase on further cross examination.

W. E. DRESSER,

recalled as a witness on behalf of the Claimant, having been previously sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q You say you boarded the "Przemsyl" on December 3, 1928 at San Pedro?

A I believe the boat was taken to Long Beach instead of San Pedro. It was in Long Beach Harbor.

Q It was seized at that time?

A Yes, it was under seizure in Long Beach Harbor instead of San Pedro; ship yards at the Harbor.

Q At that time you interviewed the crew, did you?

(Testimony of W. E. Dresser)

A At that time I interviewed the crew, yes, sir.

Q Interviewed Johnson?

A Johnson wasn't a member of the crew at that time. Johnson wasn't with the "Przemsyl" at that time.

Q He wasn't on the "Przemsyl" at that time?

A No, sir.

Q Did you see Johnson at Ensenada?

A No, sir.

Q When was the first time you did see him?

A I saw Johnson the first time on the 9th of January, 1929.

Q Where was that?

A In Los Angeles.

Q Kruger, he was a member of the crew, was he, at the time you were on board on December 3, 1928?

A He was first mate.

Q You interviewed him at that time?

A Yes, sir.

Q As a result of the interview you had with the members of the crew and Kruger, you obtained information as to what the "Przemsyl" had been doing?

A Yes, sir.

Q And information with respect to what Kruger later testified to as to having seen certain boats, speed boats, out by the "Przemsyl" and the "L'Aquila"?

A Do I understand the question? May I have the question?

(Question read.)

A Yes, sir.

Q You received information at that time from him with reference to the "Rethaluleu"?

(Testimony of W. E. Dresser)

A Not at that time.

Q You did receive information from members of the crew as to speed boats being out there?

A Not at that time.

Q Well, I understood your answer to my previous question, maybe you didn't understand me, but I thought one of the answers was you did receive information as to what the two boats were doing out on the high seas, and that speed boats had been out there.

A I understood the question to be about whether I obtained information at that time concerning which Kruger later testified to.

Q Yes.

A I didn't receive the entire information at that time that he testified to.

Q But he did mention that speed boats were out there?

A Yes, sir, I believe he did.

Q And he named them, too, did he?

A I don't recall.

Q You asked him for the names, didn't you?

A I don't recall whether I did at that time or not.

Q Did you make any memorandum of your interviews at that time?

A I presume I did.

Q Have you looked at that recently?

A I have from time to time.

Q Since I talked with you this morning and asked you a question as to when you first got your information, and you said that you would refresh your recollection from your files, have you looked at your files?

(Testimony of W. E. Dresser)

A Yes, sir.

Q Have you looked at your files since this noon, and did that refresh your recollection that you did ask Kruger as to the names of the boats?

MR. SOMERS: I submit he is cross examining his own witness.

MR. CHRISTENSEN: I don't think he is classed entirely as a friendly witness. I ask to lead him somewhat.

THE COMMISSIONER: Go ahead.

Q BY MR. CHRISTENSEN: Isn't it a fact? Read the last question.

(Question read.)

A Yes, I did ask Kruger as to the names of the boats and at that time we inspected the ship "Przemsyl" and conducted general examination of it and did not devote our entire time to questioning the crew. Later on I conducted Kruger to various ship yards in Los Angeles Harbor and Long Beach Harbor and showed him various boats, which were docked here and there.

Q Was that the same day?

A No, sir, not the same day.

Q The following day?

A On the 9th of December; that was on or about the 9th of December.

Q Before you went to the various boat yards on the 9th of December to try to locate certain boats, you had asked him for the names and the descriptions of the boats that he said had been seen by him out there?

A I asked him whether he had seen the "Przemsyl" out there.

(Testimony of W. E. Dresser)

Q Did you also ask him if he had—ask him as to what the names of the boats were?

A I believe I did, yes, sir.

Q Well, now, after the 3rd of December, you interviewed him the following day again?

A Well, on the 5th of December.

Q And at that time you asked him as to the names of the speed boats, didn't you? He gave you some information or purported to give you some information that led you to go around to these different boat yards?

A Oh, yes.

Q And that information he gave to you both on the 3rd and the 5th of December, didn't he?

A Yes, I asked him about boats that he had seen near the "Przemsyl", and being with other members of the crew, he appeared to be very reluctant to discuss the actions of the "Przemsyl" and did not at that time mention the names of the other boats.

Q Then you saw him the following day?

A I saw—

Q The 4th of December—no, the 5th of December; you say you saw him again on the 5th of December?

A I saw him on the 9th of December. I don't believe I saw him on the 6th of December. I testified I saw him on the 3rd and 5th.

Q That is what I mean. Where did you see him on the 5th?

A On the "Przemsyl".

Q At that time you further interviewed him?

A Yes, sir.

(Testimony of W. E. Dresser)

Q Did you see him between the 5th and 9th of December?

A I don't believe I did.

Q Well, did you make an appointment with him on the 5th that you would see him sometime after that, which led to you and him going out on the 9th of December, 1928 to various boat yards?

A I made no appointment with him. I went out there when I could conveniently do so.

Q He said he would go around with you, though, on the 5th, did he, in search of the boat yards?

A I believe not. I think nothing was said about that on the 5th.

Q Nothing was said about that until the 9th?

A The best of my recollection.

Q Well, on the 5th of December did he tell you what boats he had seen out there?

A He did not.

Q Did he tell you on the 9th?

A He pointed out a certain boat that he said he identified as one of the boats that had been at the "Przemsyl".

Q What boat was that?

A The "Rethaluleu".

Q Had he mentioned that name before?

A I believe not.

Q So, for the first time, you want to say that on the 9th of December was the first time that you had information from Kruger as to the "Rethaluleu"?

A The first time he identified the boat, yes, sir.

(Testimony of W. E. Dresser)

Q Had he mentioned it, is what I mean; did you know what you were going out looking for?

A No, he hadn't mentioned it; neither had I.

Q When you left the "Przemsyl" did you go directly—what boat yard did you say it was?

A Garbutt & Walsh, San Pedro.

Q Did you go directly to Garbutt & Walsh?

A No, I believe we went to the nearest ship yards, which were in Long Beach Harbor, Long Beach Channel, and then proceeded toward San Pedro, which is west of Long Beach.

Q So you were just going around looking for speed boats without knowing, without you knowing the name of the speed boat you were looking for?

A To see whether or not, out of the several hundred speed boats, he might identify a boat or boats that had been out there to the "Przemsyl".

Q You say you saw Johnson on the 9th of January?

A On the 9th of January, yes, sir.

Q When was that?

A 1929.

Q Where did you see him?

A In Los Angeles.

Q When you met Kruger on the 5th you say he was on the "Przemsyl"; was he on the "Przemsyl" on the 9th?

A I believe he was on the "Przemsyl" when I met him on the 9th, the first time on the 9th.

Q After he was with you at Garbutt & Walsh, did he go back to the "Przemsyl" or was he taken into custody by the Immigration officials?

(Testimony of W. E. Dresser)

A He was taken into custody about that time by the Immigration station at San Pedro, and I don't recall definitely just which date; about that time he was taken into custody as an alien citizen.

Q And Johnson, when you saw him in Los Angeles, he was in the custody of the Immigration authorities at that time?

A He was, yes, sir, at that time.

Q Both Johnson and Kruger have since been deported?

MR. SOMERS: If you know.

A Yes, both left.

MR. CHRISTENSEN: Q Do you know where they are now; do you know whether they are in the country or not?

A I do not.

Q If you know whether they were deported or not, do you know when they were deported?

A I believe Kruger was deported in August, 1929, about that time; left Los Angeles on the ship "Sylvan", I believe, for the Panama Canal. Johnson left on a vessel bound for Panama. I later understood that a man by the name of Olaf Johnson died on the way to Panama. I have not been able to determine whether this was the same Johnson.

Q Both of them left the Port of San Pedro or Los Angeles, pursuant to deportation?

A Well, yes.

MR. CHRISTENSEN: That is all.

(Testimony of W. E. Dresser)

CROSS EXAMINATION

BY MR. SOMERS:

Q Are you familiar with the authority under which—are you familiar with the matter for which Johnson and Kruger were deported, whether or not it was a voluntary deportation?

A As to Kruger—

MR. SOMERS: Withdraw the question, your Honor, it is immaterial. That is all, Mr. Dresser.

MR. BALTER: Just a minute.

REDIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q I have a couple more questions. Did you take Kruger into custody?

A No, sir, I did not take him into custody.

Q That was the Immigration officials?

A First taken into custody by the Coast Guard at the time of the seizure; later by the Immigration officials.

Q The same with Johnson?

A Johnson was first taken into custody by the Immigration officials.

Q At what point?

A At San Ysidro, generally known as Tia Juana.

Q How long did Kruger remain in custody, if you know, after his apprehension on December 5, or December 3, 1928?

A I believe he remained in custody until some time in April, 1929.

Q And was he released at that time?

A I believe not, I understand that he left Los Angeles at that time.

(Testimony of Ward Daniels)

Q He was apprehended again in Seattle, wasn't he?

A I believe he was apprehended by the Canadian authorities at Vancouver, British Columbia.

Q Well, did you see him up in Seattle?

A I did.

Q Did you see him on the American Border, the border between the United States and Canada?

A No, sir.

Q Was he in custody when you saw him in Seattle?

A He was.

Q Had been taken into custody by the United States immediately before you saw him up there?

A Yes, sir.

Q And that was when?

A That was in the month of May, 1929.

Q You brought him down there?

A No, sir.

Q I don't believe I identified Mr. Dresser; your official business?

A Special Agent, Bureau of Prohibition, United States Treasury Department.

Q And also so employed in the month of December 1928, until now, since December 1928.

A Up until the present time.

Q And for some time prior to December of 1928?

A Since July 1st, 1927.

MR. CHRISTENSEN: That is all.

WARD DANIELS,

the Claimant, called as a witness in his own behalf, was first duly sworn and took the witness stand.

MR. CHRISTENSEN: Counsel says he has another question he desires to ask Mr. Morse, Sr., and I will withdraw Mr. Daniels at the present time. Take the stand, Mr. Morse.

(Testimony of Frank L. Morse—Frank L. Morse, Jr.)

FRANK L. MORSE,

recalled as a witness for further,

CROSS EXAMINATION

BY MR. SOMERS:

Q I hand the Court a paper with a photograph which I will ask to have identified for the record as Libelant's exhibit the next number.

THE COMMISSIONER: 11 apparently is your next number.

Q I h*ad* you this photograph identified in the record as Libelant's Exhibit 11 for identification, and ask you, in connection with your dealings, for the boat, if you know that you met the man who is pictured there?

A No, sir, I don't recognize this party at all.

Q Never saw the original of that picture?

A No; certainly not anybody that I had business with.

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MR. SOMERS: We want Mr. Morse, Jr.

FRANK L. MORSE, JR.,

having been previously called as a witness on behalf of the Claimant, was recalled as a witness on behalf of the Libelant, and having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SOMERS:

Q You are the Mr. Morse who previously testified in this case?

A Yes.

Q I hand you a picture previously identified in the record as Libelant's 11 for identification, and ask you

(Testimony of Ward Daniels)

if you have seen the man whose picture is there shown?

A No, sir, don't recognize him.

Q He didn't visit the boat while you were in control?

A No, sir, wasn't on the boat while I was on there.

MR. SOMERS: That is all.

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WARD DANIELS,

the claimant, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q What is your name?

A Ward Daniels.

Q Where do you live?

A Whittier.

Q What is your business?

A Citrus packing and shipping.

Q Let me ask you what your business was in the years of 1928 and 1929?

A Real estate.

Q Were you identified with the Rancho Santa Fe project?

A I was.

Q How long prior to December of 1928 were you identified with that project?

A December, 1928?

Q Yes, how long prior.

A It was after that I started to work for the Santa Fe. We were preparing for it at that time, but we hadn't started.

(Testimony of Ward Daniels)

Q And your business with the project was what?

A Manager, Pasadena office.

Q That was where your real estate clientele was?

A That was the main clientele for the Rancho Santa Fe.

Q That was a Southern Pacific project?

A No, it was originally the Santa Fe Railway project, and at the time we were planning on taking it over, I was with a syndicate who bought it from the Santa Fe Railroad.

Q Then you were putting on that project?

A Yes.

Q That is down near where?

A Near Delmar, San Diego County.

Q Previous to that, what was your business?

A In charge of subdivision mostly at beach clubs; main subdivisions were at Laguna Beach.

Q You were interested in that project?

A Yes, 340 acre project.

Q Previous to that what was your business?

A Automobiles.

Q With whom and what line?

A 7 years with the Lincoln car.

Q What is the address of your citrus packing house at Whittier?

A 305 West Headley.

Q I show you Exhibits B and C of the Claimant, and ask you if you had anything to do with the taking of those pictures?

A I did.

Q When.

(Testimony of Ward Daniels)

A Two days ago.

Q On my instructions?

A Yes.

Q What boat is it that is reflected by those two pictures?

A The "Rethaluleu".

Q And did you buy that boat?

A I did.

MR. CHRISTENSEN: I will offer these in evidence at this time if the Court please.

(Claimant's Exhibits B and C in evidence.)

MR. CHRISTENSEN: Q When?

A December 5, 1928.

Q I show you Claimant's Exhibit A and ask you if that is the bill of sale you received?

A Yes, sir; bill of sale that I demanded at that time.

Q How long previous to the 5th day of December was it that you had negotiated for the purchase of the "Rethaluleu"?

A Well, it was about—the first time I saw it was about 5 days previous to that.

Q About the 1st of December, 1928?

A Yes.

Q You are the Claimant in this case?

A Yes.

Q And you are the sole owner of the "Rethaluleu"?

A I am.

Q And have been since the 5th day of December, 1928?

A Yes.

Q Now, from whom did you buy the boat?

(Testimony of Ward Daniels)

A Bought it from Mr. Curwin; the initials have just slipped my mind at this time.

Q Will you explain under what circumstances you came to buy the boat?

A We were planning on this project at Rancho Santa Fe. It is, and was at that time, a very high class subdivision. It has a tent city and it borders on the waterfront so, in getting ready for the project and obtaining the money that we were sure of making down in that territory, which wasn't any small amount, I started in to pick up a boat, because a boat could be used at that time in the project to use in interesting the class of clients we would have, in hauling them down there. At the same time I saw where I could have a lot of pleasure out of it through the summer; so I started to hunt for a boat, but not a boat of this type.

Q What type of boat were you looking for?

A I was figuring on a boat and I thought I would have to pay between $6000 and $8000, of the cruiser type, second hand.

Q And you did look around for such a boat?

A I did. I went to San Pedro and went to San Diego and went—well, in fact to all the Ports, small and large, on the coast, between San Diego and San Pedro, and while looking around I heard about this boat, that it was a good buy, and I went over to see it,—and I had to wait until the next day before I could find the owner of the boat.

Q Where was it you saw the boat?

A At Garbutt Shipyard.

Q Garbutt & Walsh?

(Testimony of Ward Daniels)

A Garbutt & Walsh, I think it was.

Q Then you had seen the boat previous to seeing the owner?

A Yes, the day before.

Q Was anybody there at the time to point it out to you?

A Yes, there was a mechanic there working on the motor.

Q Any representations made to you as to the value of the boat?

A Yes, there was. In fact a bargain is why we became interested in it, because I didn't want a boat of that type and of course couldn't use a boat of that type without making a number of changes, but after talking to the owner and finding out he was very anxious to sell, and at a price that I saw was really a steal—the boat was represented to me as not being 6 months old at that time.

Q What was presented as to the cost?

A It was representing as costing over $25,000 as it stood.

Q What price did you pay for the boat?

A I paid $9500 and a fraction, which I have forgotten.

Q $42, wasn't it?

A Yes.

Q How did that boat compare with that price?

A It was a good deal; it couldn't be otherwise.

Q With other boats you had seen?

A The best boat I had seen was one at Balboa that I could pick up for $7500, that only had one large Sterling

(Testimony of Ward Daniels)

motor, that was a cruiser, and about three years old, so of course this was a steal.

Q Well, the boat not fitting your purpose and uses, what discussion was had with reference to re-equipment?

A Well, my understanding was—I knew it was a buy, which it was, and he was going to sell in a hurry, and that is why he was making that price, so I hurriedly inquired around; I didn't have any needs—those motors in that boat—and found out I could sell one of the motors for not less than $2000, and taking that $2000 and adding about $1500 to it, I could turn it into a cruiser, which, after that state, I received bids, which I have; have now.

Q Approximately how much would the cost be, about?

A The bids, if I remember correctly, now were between $2500 and $4000; $2800.

MR. SOMERS: Bids for what?

A For converting it into a cruiser type. Out of that $2000 for the motor was figured.

Q BY MR. CHRISTENSEN: So, the net cost of the boat would be around $11,500 to you?

A That is what I figured, and by looking around at boats which were not near the type of this boat, the boat was then worth not less than $30,000, what they were asking for others, and not as good as this one.

Q Had you ever seen a boat of this type before?

A No. Pardon me; I didn't—I don't know what you mean.

Q I mean had you ever seen a boat, a speed boat of this type with Liberty motors?

A No, I never had.

(Testimony of Ward Daniels)

Q Well, did you buy the boat right away or did some time elapse before you bought it?

A About 5 days.

Q That was why you were making a check as to the representations as to the cost of the boat and as to the cost of equipping it, in order to put it into shape, in the kind of a boat outfit that would be suitable for your uses?

A No, I figured that all out in about a day. The rest of the time I was hurrying to see if I couldn't better myself, because I didn't want to spend that much money on boats. I didn't actually have bids at that time. I just found out approximately what it would cost.

Q Now, let me ask you this, Mr. Daniels, were you going to have the boat equipped and commissioned for use in the spring?

A I was going to have it done immediately. The project we were working on was about ready.

Q Why didn't you do it immediately; the boat was libeled in April.

A Well, it took a little more time than I thought it would take.

Q Let me ask you this, showing you exhibit—Claimant's Exhibit D for identification, I will ask you to state whether or not that was one of the estimates you received for doing that work.

A It was.

Q You had previously communicated with the people on the subject?

A Yes I had, and I asked them to give it to me in writing. In fact I wanted it mailed to me because I was up town.

(Testimony of Ward Daniels)

MR. CHRISTENSEN: Well, I offer this in evidence if the court please.

MR. BALTER: Let me see it. (Paper handed to the attorney.)

Q BY MR. CHRISTENSEN: Now, the boat was libeled on April 22nd or thereabouts, 1929?

A I don't know the exact date. I know it was on a Saturday.

Q Since then the boat has been in the custody of the Government?

A Yes.

Q During the time you owned the boat was it always at Garbutt & Walsh's?

A Yes, it was; to my knowledge it was never moved.

Q That is from December 5th until April 22nd?

A Yes.

Q When it was seized by the Government?

A Yes.

Q Had you any information or did any one intimate to you that this boat which you were buying was a rum runner?

A Well, not that I know of. I wouldn't have paid any attention to it any way. All I asked was a clean bill of sale.

Q You wouldn't have bought a boat that you knew had been violating the law, would you?

A Really, to tell you the truth I would, as long as I had a clean bill of sale, I didn't care what the boat had done previous to that time if I had a bill of sale, because I didn't know what the boat had ever been used for or anything else. All I asked was a bill of sale, and I wanted

(Testimony of Ward Daniels)

that bill of sale from the Customs Department, which I received.

Q You knew nothing about this boat?

A No, absolutely.

Q Had you heard anything about it?

A I heard plenty in the last few months.

Q I mean had you at that time heard anything?

A No, I hadn't.

Q Had you heard it had ever been used at that time for any illegitimate purpose?

A I did not.

Q As far as you know it was just as clean a boat as any other boat you had looked out while you were searching for a boat to buy?

A Yes, sir, it was.

Q So the boat was never in service?

A No, it was not, except once, when I had a ride on it myself, and I never went outside the harbor.

Q. Was that testing it?

A Yes, testing it and giving a friend of mine a ride on it.

MR. CHRISTENSEN: Take the witness.

CROSS EXAMINATION

BY MR. BALTER:

Q So you made no effort to find out the past history of the boat at all; in other words you didn't care what it was?

A Not any more than if I was buying an automobile.

Q Who did you buy the boat from?

A Mr. Curwin.

Q How do you spell the name?

(Testimony of Ward Daniels)

A C-u-r-w-i-n.

Q Where did you meet him?

A Met him at the ship yards.

Q Did you call for him or he call for you?

A Well, I saw the boat the day before and inquired about it and was told about it, and the fellow who was working on the motor told me he would get hold of him and have him get in touch with me; which he did, and I saw him the following day.

Q When was that?

A About the 1st of December.

Q Did Curwin tell you anything about why he wanted to sell the boat?

A Said he needed the money.

Q Is that all he said?

A About all he said.

Q Did he say he was in any particular hurry to sell the boat?

A He said he was in a hurry to sell it and was going to sell it in a hurry, and that is why he was putting the price on it which he had on it at that time.

Q Did he tell you why he was in a hurry?

A No.

Q Did you do any bargaining, or was that the first figure he placed, $9500.

A We did some bargaining.

Q What did he ask for it first?

A I don't remember.

Q Did you pay him cash or check?

A I gave him the cash. He requested it.

Q He requested that you pay him in cash?

(Testimony of Ward Daniels)

A Yes.

Q Did you get suspicious of that?

A No, not at all, only to the extent that I said all I asked was just a clean bill of sale.

Q What did you mean by "clean bill of sale"?

A Why, that was my way of expressing a bill of sale that is absolutely spotless of anything against the boat.

Q How can a bill of sale be otherwise than just a standard bill of sale?

A I have seen a lot of them that weren't.

Q What do you mean?

A I have sold a lot of real estate on a bill of sale with plenty against it.

Q You don't have the bill of sale; you mean a mortgage or a trust deed or something that might have an encumbrance on it, is that what you mean?

A Yes.

Q How can you classify that with a bill of sale on a boat? Had you ever bought a boat before?

A Yes, I had.

Q What did you buy?

A I bought speed boats, two small boats.

Q When?

A I bought the first one when I was fifteen years old.

Q When did you buy the next one?

A I bought the next one just before the war. I was in Oakland at that time.

Q Buy any more?

A Not until this one.

Q But you don't know what you mean by a clean bill of sale, whether there is anything else than—

(Testimony of Ward Daniels)

A Just my way of expressing. I picked it up in the automobile business, because there is a lot of them not clean. Unless you bought something and had something turn up afterward, you wouldn't be able to realize what a clean bill of sale is.

Q Wouldn't you ordinarily, if you were so anxious to find a clean bill of sale, which of course implies that you anticipated that there might be some defect arise in it later, wouldn't you supplement your purchasing contract by an investigation of what you were buying?

A I did.

Q What did you do?

A I went down and got a bill of sale from the Customs Department at San Pedro, and that satisfied me.

Q Of course the Customs Department does not sell the boat?

A No.

Q They issue the form?

A This is the form I received there.

Q Standard form of bill of sale?

A Yes.

Q Curwin signed it?

A Yes.

Q Did you make an effort to investigate who Curwin was?

A None at all.

Q Or where he got the boat?

A No, he had a bill of sale to him from the ship yards and I saw that first. In fact, I asked for that and took that with me down to the Customs Department.

(Testimony of Ward Daniels)

Q Do you know the expression "hot car" in the automobile game?

A Yes.

Q What does that mean?

A A hot car?

Q Yes.

A Well, that is a hot one to answer. The expression I have heard many times, and even seen it in the paper; a hot car is a car that the officials of—different types of officials are after trying to pick it up; there is something against the car. It has been used mostly since prohibition to my knowledge.

Q Well, when you buy or sell a car do you anticipate that the car you are going to purchase might be a hot car and make any effort to ascertain about it.

A Not if they give, as I was given, a clean bill of sale. If you get a bill of sale of that character, I have never known, as long as you buy a piece of property such as a car or a boat or anything else and nothing wrong is done with that property while it is in your possession, I never knew before that it was—that there was still a chance of some one bringing some charge against that property, no matter what it was. That being my knowledge, I couldn't think anything different in this case, as long as I have that bill of sale, and especially getting it from the Customs Department, I was positive it was O. K. In fact, I never thought anything about it.

Q. You didn't consult with counsel or anything did you on the sale?

A No, I didn't.

Q Had you ever seen Curwin before that?

(Testimony of Ward Daniels)

A No, never had.

Q Did you know McCluskey?

A No, I didn't.

Q Never heard of John McCluskey?

A No, I didn't. I have heard his name mentioned in here.

Q Well, of course, I mean before that?

A No, I didn't.

Q Well, what did you expect to do with that boat?

A I was going to use it in this project at the Rancho Santa Fe. At the same time I was making money and having pleasure out of it and still could sell the boat at a profit, and would be making money on the boat after using it in the business, and still have pleasure.

Q You knew you were buying the boat at an abnormally low price?

A I certainly did.

Q What did you expect to do with the boat; take it down from here to the Rancho Santa Fe; take prospects down there?

A Yes, just that. They were figuring on a pier. This is a very, very high class subdivision, if you don't know it.

Q. Yes, I have heard of it.

A It is quieting down now. It is nothing but a tent city. They bought the Whitney land and were turning that also into the city and were building a huge pier, private property, and of course this would mean a lot to us on the project, having a boat of this type. The way I figured, I would never have gone into a boat as expensive as that if I didn't realize and know that I could use that boat and still sell it and make a profit on it after-

(Testimony of Ward Daniels)

wards. Still it certainly was the type of boat that would have attracted, using it at a project of that type.

Q You expected to put it into immediate use?

A Just as soon as I possibly could.

Q Well, how soon would that be?

A Well, I would really have had it on the ways, I am sure in another two weeks.

Q What started the delay?

A Well, money had something to do with it and I spent a lot of money for that boat.

Q What did you do with it after you got it?

A Stayed right at the yards.

Q You didn't spend any money on it?

A No. I had to sell the motor, one thing. I didn't run short of money. There was a lot of things. The Rancho Santa Fe, we had been working on that from October on from the time we started, which I think, was May 1st. In the meantime the project was all planned to shoot on the first of the year, and trouble between the Santa Fe Railroad and the syndicate and the paying of something like a million and a half dollars tied it up, and it looked as if we were not going to get a contract to put over the deal. So, if I didn't get a contract, the boat wasn't any use to me, and still I could take the boat and sell it at a profit, so I left it there waiting for that time, and at the same time money had something to do with it. Another thing was it took time to make these plans.

Q. Did Curwin make a statement to the effect that he had tried to sell the boat to the shipyards and couldn't sell it; did he make any statement to you he had tried to sell the boat to anybody else?

(Testimony of Ward Daniels)

A Well, he said he had made up his mind to sell it and at that price he wouldn't have any trouble.

Q Did he have the price tacked on it or advertise it?

A Well, I went to Balboa and all these different places hunting around for a boat, and while going to different places hunting for a boat one party told me where I could find a boat that was a steal, and would be the boat, by converting it, that would be the boat I should buy.

Q Why is it you kept McCluskey on as master of the boat?

A The man I hired wasn't McCluskey.

Q Your license shows McCluskey as your master.

A The man I hired was McClumskey.

Q Who is he?

A He is the fellow I hired to take care of the boat. I didn't retain any one or hire any one as mate. I hired this fellow who was introduced to me at the ship yards to take care of the boat until I could make other arrangements, or until the conversion of the boat was started, or whatever I planned to do. I had to have some one. I wasn't a licensed pilot.

Q You are sure it wasn't John McCluskey?

A The one I hired is John McClumskey, and his name is on the bill of sale.

Q His name is also on the license?

A I don't know. I didn't see any license.

Q Didn't you apply for license to operate this as a pleasure yacht?

A They didn't get it at the time I got this bill of sale.

Q You were present while this was done?

(Testimony of Ward Daniels)

A If my signtaure is there, I was. I wasn't in the habit of buying boats and of course I can't answer some of your questions. The only thing I know is the bill of sale.

Q Do you recognize this man here? (Indicating the deposition.)

MR. SOMERS: Pointing to Exhibit 1 of the deposition.

A I don't think so.

Q Never saw him before?

A I don't think I ever did.

Q How long did McClumskey stay with you?

A Well, he was there since about, that I knew of, for about six weeks. You see I wasn't paying him a regular salary.

Q What did you pay him?

A I offered him—I didn't know whether he was a seaman or what he was. They told me he was capable of taking care of that boat.

Q Who told you that?

A Curwin.

Q Curwin did?

A Yes, he told me he could find me a man to take care of the boat. I wanted some one to watch out for the boat until I could get it on the ways. A boat couldn't lay there alone without some one to watch it, and I couldn't watch it, so I hired this fellow. You mean this one?

Q I am asking you if you identify him.

A No, I don't.

Q How many times did you see him?

(Testimony of Ward Daniels)

A I saw him four or five times.

Q You definitely say that isn't him?

A No; almost positive; quite sure.

Q Didn't you go down to the Customs Office when you got the registration, the license?

A When I got the bill of sale, yes.

Q You filled out an ownership oath, didn't you?

A Yes. I paid for it. If my signature is there I did.

Q Did McClumskey go along with you?

A He was there when I got the bill of sale, and there were some other papers to be filled out, which—they were busy at the time and I said I would come back and I came back and signed it. And if he did come back he came back alone; not with me. The only papers this party signed with me was the bill of sale.

Q This is McClumskey?

A Yes.

Q Did he sign the bill of sale?

A Yes. The reason I say that I saw the signature there.

Q You saw the signature on the bill of sale?

A Yes.

Q Will you find it for me?

A There is the signature right there. (Indicating.)

Q This is the same fellow who went and signed the master's oath, I suppose, at the Customs House?

A Well, they said I had to have some one. I wasn't a licensed pilot.

Q Did you know McClumskey's signature?

(Testimony of Ward Daniels)

A No, I don't. I didn't know how long he would be with me at that time, just until I got it on the ways, which I thought would only be a matter of a couple of weeks.

Q You didn't expect to go into actual operation immediately?

A Not until we were sure of the contract, because when I was sure of the contract I had a guarantee of $25,000 a year.

Q Are you still engaged with them?

A Oh, no.

Q What are you doing?

A I am in the packing business; packing and shipping.

Q This is your signature is it?

A Yes.

MR. CHRISTENSEN: Identify the page, will you?

MR. BALTER: Page 97 of the official records of the Customs House.

MR. SOMERS: Ownership, back of page 97.

Q BY MR. BALTER: You identify this signature?

A No, no. I signed alone.

Q Can you describe this man Curwin, what he looks like?

A It would be quite vague.

Q Can you remember it?

A Well, he was a kind of tall and thin and I heard—I heard some one say in giving their testimony yesterday afternoon, light, but I would have said he was dark.

Q How tall would you say?

A About five feet nine, I should say.

(Testimony of Ward Daniels)

Q Wears glasses or not?

A No.

Q Mustache or not?

A No.

Q Do I understand you correctly that nothing was done with the boat after you got it; no repairs?

A The boat was never even moved. That is the only time I had it out, was we went around just in the harbor, and we hit a small log and bent one of the propellers and that is why it was really never used.

Q Did you know Anthony Strallo?

A No.

Q Did Curwin ever mention him to you?

A No.

Q Did he ever mention Tony Cornero to you?

A No.

Q Ever mention the "Przemsyl" to you?

A No.

Q Did you know about it yourself?

A No, I didn't.

Q Did you ask the people at Garbutt & Walsh what they knew about the boat?

A Yes, I was trying to question every one to make sure I was right. I was talking to a number of different ones. In fact, I believe I spoke to Mr. Evans but he doesn't remember that. He said this morning he had never seen me before. When I walked up to him, he didn't know who I was, and talked to him about that boat. In fact, when I went and talked to him I didn't know the name of the boat and I pointed it out and he

(Testimony of Ward Daniels)

told me it was a "pip", and I asked him how fast it was and he said he really didn't know, he thought about 40 miles an hour; and I am just saying that that is the only dope I had on the boat. I went to different ones; then one of the carpenters there, I talked to him, but I didn't talk to any one but one of any trade, because I was only after information for myself.

Q Just after information as to the construction of the boat?

A Yes.

Q Whether it was a good buy?

A That is all.

Q Did you ever try to inquire as to the maintenance cost of the "Rethaluleu"?

A No, I didn't. I knew about what it would cost.

Q Who told you of that?

A Well, I was a motorist and had flown. In fact, I had a plane while in Oakland with a Liberty motor in it.

Q You are sure you didn't pay for any bills for repairs on the boat after you got it?

A No, sir. Forty-two dollars is the only thing I have paid out on the boat, so far as the boat is concerned, up until it was confiscated.

Q Do you know whether anybody else paid for you? Did you authorize anybody else to pay bills for you?

A Never did. No one had any authority to make any repairs. To my knowledge, and I know there wasn't any repairs made on the boat.

MR. BALTER: That is all.

(Testimony of Ward Daniels)

REDIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q A boat of this kind always needs somebody on it when it is lying in the water, to pump it?

A Yes, that is why I wanted to have some one on the boat to watch it every day while it was there.

Q And keep the engine oiled?

A I understood he would stay on the boat. I suppose that it would be only a matter of a couple of weeks. The fact is, the last time I saw him I still owed him for it and didn't see him any more from that time on. The boat was alone, to my knowledge, when it was taken.

Q It finally went up on the ways, didn't it, at Garbutt & Walsh's?

A No, still in the water.

Q Still in the water when it was seized?

A Yes.

Q The first time you ever heard of the "Przemsyl" or the "L'Aquila or anything about this libel was when?

A Well, I think sitting in this room. If I ever heard of it before I don't remember.

Q Other than what the complaint itself said, the libel?

A That is all.

MR. CHRISTENSEN: That is all.

MR. BALTER: That is all.

MR. CHRISTENSEN: Now, I have some more offers of proof. It is twenty-five minutes to five.

THE COMMISSIONER: How much more?

MR. CHRISTENSEN: I have been trying to get hold of this man Curwin and I have had a couple of

(Testimony of Emmett L. Smith)

investigators trying to locate him and I think there is one other witness besides him. Aside from Curwin, whom we have not been able to find so far, I don't think there is anything more than one other witness and the offers.

THE COMMISSIONER: Do you have any more evidence to offer?

MR. SOMERS: Counsel at one time spoke of moving to strike the deposition of Kruger. I wonder if we might not utilize the time by letting him proceed with his objections if he has any.

MR. CHRISTENSEN: Couldn't we do that in the morning? It is nothing we can do in three or four minutes.

THE COMMISSIONER: I had just as soon stop now.

(Whereupon an adjournment was taken until 10 o'clock a. m. Thursday, May 29, 1930.)

LOS ANGELES, CALIFORNIA, THURSDAY, MAY 29, 1930, 10 A. M.

EMMETT L. SMITH,

called as a witness in behalf of the claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q What is your name?

A Emmett L. Smith.

Q What is your occupation?

(Testimony of Emmett L. Smith)

A Deputy Clerk of the United States District Court.

Q For the Southern District of California?

A Yes.

Q You are connected and identified with the office at Los Angeles?

A Yes.

Q I show you first a picture on the back of which—

THE COMMISSIONER: We will take notice of that. As far as they are concerned, the fact is they are the files and those are the exhibits.

MR. CHRISTENSEN: These are the exhibits in those cases. There was some question of stipulation.

THE COMMISSIONER: Well, we will have to take notice of the records of this court.

MR. CHRISTENSEN: These cases—I am going to see if I can prevail upon counsel to ask for the return of these exhibits then I am going to offer upon return these particular exhibits so identified and I presume that, rather than make copies of these that perhaps will be the better course. Is that agreeable to counsel that these may be made part of the record in this case on the offer—solely on the offer?

MR. BALTER: If at some future time some court holds it is proper, I don't see why you can't take them out of the other file on substitution of copies.

MR. CHRISTENSEN: My point is the court above is going to get the full force of the competency without them being part of this record.

MR. BALTER: The court above will recognize the seal and records of the officers of the inferior courts.

(Testimony of Emmett L. Smith)

No need to burden the record at this time with additional offers.

MR. CHRISTENSEN: Of course, I don't anticipate we are going to get that far, but if we do I want it as part of the record.

MR. CHRISTENSEN: Q The document that I first handed you, can you tell us what that is?

A I identify that as reporter's transcript of the testimony and proceedings at the hearing before Hon. Frank R. Willis, referee, and filed—

MR. SOMERS: We submit your Honor, that the document speaks for itself.

THE COMMISSIONER: We will take notice of the stamp and the signature of the deputy clerk.

MR. CHRISTENSEN: The two documents that I have in my hand bearing the title of this court, entitled United States of America vs. "The Seal," both numbered as cases in this court, 3488-J and each bearing the stamp respectively of the dates of June 15, 1929, and December 14, 1929, the stamp thereon being the official stamp of the clerk in this court. Let me ask you, they bear the official stamp of the clerk of this court?

A It bears the official filing stamp of the clerk of this court.

Q The same being filed in this case June 29, 1929. The document which I now hand you is the official judgment roll, is it not? In case 3488, United States vs. "The Seal."

A These documents are the roll of the papers as we call them for case 3488-J.

(Testimony of Emmett L. Smith)

Q And contains the findings, does it not, of the referee, and the decree reported upon those findings?

A Apparently so.

Q And in case 3486, United States vs. Motor Boat "A-1817", that is also the official enrollment of the documents in that case?

A Yes.

Q Likewise containing the findings of the referee?

A These are papers including the report of the United States Commissioner and the decree of dismissal and release based thereon.

MR. CHRISTENSEN: All right, that is all. Now, if the court please, I offer to prove, and I can call the court reporters in the respective cases of the United States vs. "The Seal", case No. 3488 and also in case of the United States vs. the Motor Boat "A-1817," case No. 3486, and prove by them that the depositions which are part of the files of this court in this case, which were received—

MR. SOMERS: Object to the statement "In this case."

MR. CHRISTENSEN: Received in the particular cases 3488 and 3486, and by this testimony, as well as secondly, by the depositions so on file and received in evidence in those respective cases, that the witness Eric Olaf Johnson and Walter Kruger, who testified in both of said cases and who also testified in the present case of the United States vs. the "Rethaluleu" No. 3487-M, that their depositions and testimony in the two cases were substantially, as to the occurence and facts testified to by them in the depositions, executed in the case

(Testimony of Emmett L. Smith)

of the United States vs. the "Rethaluleu" No. 3487, the present one before this court, are substantially the same. I make that offer of proof.

MR. BALTER: We make the same objection, if your Honor please, and on the further ground if it is substantially the same we have the depositions now in this case and it is unnecessary to put the others in.

THE COMMISSIONER: Well, the testimony in the other depositions as far as it relates to any of the issues in this case, if there is anything there that bears upon the credibility of the witnesses, why, it would be proper to be received. I don't want to open up the door to any other testimony relative to the two other boats, the "A-1817" and "The Seal," but any statements in those depositions relative to this particular boat, the "Rethaluleu", can be received, it seems to me.

MR. CHRISTENSEN: Well, I seek to offer these depositions upon this ground, that their testimony with reference to the location of the "Przemsyl" and the "L'Aquila" positions one, two and three as testified to in the depositions in this case, and also the testimony with reference to the "A-1817" and "The Seal" and the "Rethaluleu" as given in this case were substantially the same as the testimony that they gave both in their depositions—I mean in their statements in both the case of "The Seal" and the "A-1817." Then I am going to offer the findings of both referees and the decree predicated thereon as an adjudication of a fact.

THE COMMISSIONER: You are offering the depositions as part of a further offer of the findings of fact in the other two cases?

(Testimony of Emmett L. Smith)

MR. CHRISTENSEN: Yes.

THE COMMISSIONER: Not for the purpose of impeachment or as going to the credibility of the witnesses, but as showing upon what facts the findings that you are about to offer were made, is that it?

MR. CHRISTENSEN: That, plus—I can't limit myself to say that it does not go to their credibility.

THE COMMISSIONER: Well, I mean their credibility to this extent, that you are offering these depositions to show that there is any conflict between the statements made in these depositions and the statements made in the deposition in this case, upon any point that is material to this case and relevant, why then, these depositions can be received. But if that is not the purpose—if you have some other purpose in mind, why state that and we will go into it.

MR. CHRISTENSEN: Perhaps it isn't stated clearly. Offer the depositions to show that the testimony of these two witnesses given in the case of "The Seal" and the case of the "A-1817" as to the visits and contemporaneous visit of the speed boats to the "Przemsyl" and the "L'Aquila" is substantially the same as the testimony given in the depositions they gave in this case; that the particular speed boats testified by them in those two cases of "The Seal" and the "A-1817" were the speed boats mentioned in the deposition in this case.

THE COMMISSIONER: Is that all?

MR. CHRISTENSEN: On the depositions.

MR. BALTER: Same objection and on the further ground it is incompetent, irrelevant and immaterial; certainly it is incompetent to offer the whole deposition.

(Testimony of Emmett L. Smith)

If you want to take some excerpts as to the "Rethaluleu", that is within the bonds of possibility.

MR. CHRISTENSEN: My particular object is to show and to get what they said about contemporaneous and interlocking testimony with reference to who came out there to the "A-1817", and the time and the place. That it is substantially the same in this case as in those cases.

THE COMMISSIONER: Are you offering that as a part of an offer of the findings of fact made in these other cases?

MR. CHRISTENSEN: Yes.

THE COMMISSIONER: You did not so state.

MR. CHRISTENSEN: I thought I would take one step at a time.

THE COMMISSIONER: If you are simply offering the depositions to show that they are the same as the depositions in this case, that is not proof of anything. As I understand it, you want to show that in the two other cases that these witnesses testified, and findings of fact were made contrary to the testimony given by those witnesses; that is what you want to show, isn't it?

MR. CHRISTENSEN: Yes.

THE COMMISSIONER: Well, I don't think you can show it in this case, as I indicated yesterday. If you are making the offer of the whole thing together, I sustain the objection.

MR. CHRISTENSEN: Well, I want to make my offer first as to the depositions and next I want to offer that in the case of "The Seal" No. 3488-J, the Referee

(Testimony of Emmett L. Smith)

Judge Frank R. Willis made the following findings of fact and recommendations—

MR. BALTER: Are you offering that in evidence or making an offer of proof?

MR. CHRISTENSEN: Well, I have already identified it and I presume that on my offer of proof I have laid the foundation so I may read it in evidence and that is what I propose to do, and I offer each and every part of the findings separately and also in toto. Now may it be stipulated that instead of me going to the trouble of reading the whole thing in now that the court reporter might copy it?

MR. BALTER: Well, I think it is sufficient if you say you offer the findings of fact.

MR. CHRISTENSEN: Oh, but I don't have it before the court. How does the court know what it is unless it is in the record.

THE COMMISSIONER: Any court will take notice of this, of anything in its own files and the files of the court below.

MR. CHRISTENSEN: I think there is a limit upon that, that the only thing the court will take notice of is of the particular things that are in the file itself in that particular case, and that a court does not have to take judicial notice of the facts in other cases.

MR. BALTER: The court would certainly take judicial notice of findings of fact.

THE COMMISSIONER: They will take judicial notice, the District Court and the Circuit Court of Appeals will, that is, if you can overcome the objection made and can show that this is material and relevant

(Testimony of Emmett L. Smith)

you will have no trouble in getting the court to take notice of this judgment roll in this case.

MR. CHRISTENSEN: Yes, I will. They will not be a part of this record. In other words, if I had it as an exhibit here so I could offer that, that is all right. But I want it to be part of the record either by certified record or have the court reporter copy it in. I have identified it and we are depending on the ruling of the court on it, and the court will not have any idea of the findings or anything except as they may be in here.

THE COMMISSIONER: Until such time as the court finds out that there has been error in excluding them, it is probably not interested in the finding.

MR. CHRISTENSEN: Why certainly. Because the court may say "Well, we have nothing before us; we don't know whether it is material at all; we don't know what the findings were; let us see what the adjudication of facts were on this offer of proof; that is the only way we can determine it." And I only ask for the stipulation; the record is here, and unless they question the record, it seems to me we can save time by it.

THE COMMISSIONER: Well, I will let you put in—you won't have the deposition before the court.

MR. CHRISTENSEN: Well, I have made my offer of proof on that. I tried to summarize the depositions by a statement.

MR. BALTER: Why don't you do the same here?

THE COMMISSIONER: All you need in the way of a record is enough to show what you are offering and what the ruling is.

MR. CHRISTENSEN: All right.

(Testimony of Emmett L. Smith)

THE COMMISSIONER: Now you can state, and I state, as I am familiar with one of these cases, having heard it, and having glanced over the file in the second one, and the findings of fact made by the Commissioner who heard these two cases were contrary to the evidence as testified to by the witnesses in the depositions. That is shown there. However the findings of fact were made in one case in reference to a boat called the "A-1817," the respondent in that case, and in another case against a boat known as "The Seal," and any issues relative to "The Seal" or the "A-1817" are not relevant to this case. For that reason impeachment is impeachment upon an irrelevant issue and an issue that is collateral, and for that reason I am not accepting the evidence you are offering. It shows clearly what the offer is, and you have a sufficient record there to show error if there is error.

MR. CHRISTENSEN: I don't think so Judge. I think this: My offer as to the deposition, I think is sufficient because we have the depositions in this case. That is sufficient. Because the testimony was substantially the same with reference to the activities of these boats and the contemporaneous activities by these witnesses. I did differ seriously with the court's ruling yesterday that it is immaterial as to what transpired out there with reference to these other boats, involving persons they identified that were on the "Rethaluleu" and being on the other boat.

THE COMMISSIONER: It is irrelevant.

MR. CHRISTENSEN: I say it is relevant because I am there proving an affirmative fact. They proved

(Testimony of Emmett L. Smith)

an affirmative fact that certain things happened. I am proving the affirmative fact that they did not happen.

THE COMMISSIONER: The Government, in order to establish the case against the "Rethaluleu", it is not incumbent upon them to show there has been a violation upon the part of the boats "A-1817" or "The Seal."

MR. CHRISTENSEN: I agree with the court on that absolutely, but when they say X Y and Z were there altogether at the time, I can prove these fellows were not telling the truth, by showing they were not there.

THE COMMISSIONER: Now, you have admitted that it is not necessary for the Government to prove these were violations on the part of the other two boats, and if you did offer evidence in this case that goes to the issues raised upon the "A-1817" and "The Seal", then is it not necessary first before determining the issues here and the credibility of the witnesses as affected by this testimony, in the first place it is necessary to go back and determine the issues as to the guilt or innocence of the "A-1817" and "The Seal." We have to make a finding on the issue that is clearly the issue in this case and the rule is so well settled I cannot see that there can be much question about it. I indicated yesterday that if these witnesses were on the stand as they were when the depositions were taken—if these witnesses were on the stand now and you wanted to cross examine as to some statements made about the "A-1817" and about "The Seal" I probably would permit you that latitude in the cross examination. Having cross examined on it, I could not then go ahead and permit you

(Testimony of Emmett L. Smith)

to offer further proof, affecting an issue on the "A-1817" and "The Seal."

MR. CHRISTENSEN: They have been cross examined on that. The deposition shows it. I don't know whether I have made my position clear or not. I want to state it so I get it clearly in the record.

THE COMMISSIONER: I understand the position. I see what your position is. Your position is simply this, that the testimony has been given as to the other transaction that occurred along about this time; you say contemporaneously; and that findings of fact have been made in the other cases, contrary to the depositions and testimony given in the other cases. I will say while on cross examination, if you had the witnesses on the stand and wanted to cross examine them as to "The Seal" or the "A-1817", you would probably be allowed to do it, but you would not be permitted to go ahead and offer evidence upon any issues raised there.

MR. CHRISTENSEN: Well, I want to make my position clear now at least for the record, that it be my offer of proving certain things with reference to where the "A-1817" was during the months of July, August and September, and certain facts as to where "The Seal" was during the months of July, August and September, were facts in denial of facts testified to in the particular deposition that is involved in this case, and as to the particular transaction involved in this case, for the purpose of showing that those witnesses, in regard to those facts so testified to with reference to—in this case of the "A-1817" and "The Seal"—that they

(Testimony of Emmett L. Smith)

did not speak the truth. Now, that is a fact, and the court may find facts as to the testimony of witnesses, may find that they did not tell the truth in certain respects and the court may, because of the fact that they did not and the general character of their testimony, say that I will not believe them or any part of the story, because of the established untruth of certain portions of the testimony given in the depositions.

THE COMMISSIONER: I understand that. I would accept any proof of the character that you offer as long as it related to some issue raised upon this vessel. Now there is a presumption that every witness is telling the truth; there is an old common law presumption that a man once convicted of perjury is presumed not to be telling the truth, and I think at one time a man convicted of perjury was not considered a competent witness for any purpose, but as the law stands at the present time, every witness is presumed to be telling the truth. In this particular case in the depositions they have testified as to the "Rethaluleu."

MR. CHRISTENSEN: No, he testified to the "A-1817" and "The Seal."

MR. BALTER: The "A-1817" is immaterial to this case.

THE COMMISSIONER: There was testimony given as to the "Rethaluleu" and the only thing material to this case and the only thing relevant here is whether or not the "Rethaluleu" was engaged in these particular activities and, as bearing on that, as to whether these witnesses told the truth with reference to the "Rethaluleu."

(Testimony of Emmett L. Smith)

MR. CHRISTENSEN: Any evidence in connection with that, testified to, whether it was the "Przemsyl" out there—if I can prove it was not the "Przemsyl" they said it was, and I am limited to the "Rethaluleu", I can't go into those facts.

THE COMMISSIONER: You are charged with making a contact with the "Przemsyl" and bringing in liquor. If you want to show the "Przemsyl" was never there, we will take your evidence on it.

MR. CHRISTENSEN: But that, to my mind, is analagous to the situation with reference to attempting to tie up certain individuals on the "Rethaluleu" with the "A-1817," and it was all a part of a continuous transaction. They testified to a continuous transaction in this case.

MR. SOMERS: We have nothing in our libel connecting the "Rethaluleu" with the "A-1817."

MR. CHRISTENSEN: Your testimony is full of it.

MR. SOMERS: We don't care about the "A-1817" or "The Seal." It is no different than if they testified there were some other vessels out in the ocean. We are interested in the "Rethaluleu" and its activities between the "Przemsyl" and the "L'Aquila."

MR. CHRISTENSEN: Then, I have the right to test a witness as to whether or not somebody else was there.

MR. BALTER: No.

THE COMMISSIONER: On cross examination.

MR. CHRISTENSEN: All right.

THE COMMISSIONER: You may test his recollection.

(Testimony of Emmett L. Smith)

MR. CHRISTENSEN: And then to prove that the things he says he saw at that specific time—suppose a fellow says—

MR. BALTER: Your Honor, I think—

MR. CHRISTENSEN: Wait a minute. I am talking and I am going to finish my talk and get it in this record. If a may says it is black and dark and hazy on cross examination and it is a question of identification he says no, it was light that day, can I prove it was hazy and dark?

THE COMMISSIONER: I just got through telling you if you had this witness on the stand at the present time you would be allowed to cross examine as to the "A-1817" and "The Seal", but you will not be permitted to raise an irrelevant issue. It requires determination, in order to determine as to the credibility of the witness.

MR. CHRISTENSEN: Suppose they testified they did see them there, that they were all there together and working between one boat and the other, the "A-1817" and "The Seal" and the "Rethaluleu", won't I be able to show that wasn't true? And that it wasn't there at that time? I have gone further in this case and I have shown affirmatively in this case that on dates that they testified to the "Rethaluleu wasn't even there.

MR. BALTER: Well, we doubt that very much.

THE COMMISSIONER: The question in this case is whether or not the "Rethaluleu" is guilty of making the contact.

MR. BALTER: I think we are wasting a lot of time.

(Testimony of Emmett L. Smith)

MR. CHRISTENSEN: That is true, but we are not wasting time when we come to test whether or not the story they told in the deposition was true or false. Now I propose to show, and that is what I am showing, that the fact and the testimony of those two cases by these two witnesses, and the cases they develop were identically the same, and is identically the same as the testimony developed by these two witnesses here in this particular case, and that there has been an adjudication on it.

THE COMMISSIONER: We cannot receive it.

MR. CHRISTENSEN: Then, I ask an exception to each one of these rulings; and now, getting back to the proposition, am I going to be compelled to read this in?

THE COMMISSIONER: I am not going to let you read it in.

MR. BALTER: I think counsel has said too much on the question of proof. I think the Government ought to except to your Honor's ruling.

THE COMMISSIONER: In other words, I am not going to permit you to make the offer of proof.

MR. BALTER: Your idea of an offer of proof and mine and the Commissioner's differ very radically. An offer of proof is simply an offer of what you intend to prove.

THE COMMISSIONER: I am not going to let you read these findings into the transcript. We gave a good deal of leeway to start with.

MR. CHRISTENSEN: Well, I propose now to offer, if the court please, that in this case—

(Testimony of Emmett L. Smith)

THE COMMISSIONER: You can state you are going to offer to prove that findings of fact were made contrary to the evidence given by the witnesses Kruger and Johnson in those two cases. That is a sufficient offer of proof. You can have that statement in there and that will show the court what you are offering and what we refuse to accept, and if they find out I am wrong it probably will come back down here and they will make me put it in.

MR. CHRISTENSEN: The offer of proof with reference to the testimony being substantially the same in the depositions?

THE COMMISSIONER: Yes. An offer of proof isn't evidence; simply a statement of what you are trying to show; what you want to show.

MR. BALTER: He is trying to make it evidence.

MR. CHRISTENSEN: Yes, but I can't do that—no, I am not trying to do that at all.

THE COMMISSIONER: Well, go ahead.

MR. CHRISTENSEN: In other words, the court limits it to the statement that he has made and will not permit me to read—

THE COMMISSIONER: I will let you make a statement similar to that if you are not satisfied with it.

MR. CHRISTENSEN: No, I will make the offer of proof of course, in the language as the Commissioner has indicated, but I will say that I am not contented with it.

THE COMMISSIONER: You want that read into the transcript, the findings?

MR. CHRISTENSEN: That is my offer of proof.

(Testimony of Ward Daniels)

THE COMMISSIONER: They won't be lost. You will be able to get them at any time if it is decided you are entitled to offer them. You will have no trouble getting these findings. They will be in the file.

MR. CHRISTENSEN: But I cannot have a complete record of the situation in the matter before another court.

THE COMMISSIONER: The court will have enough to rule on. Let us go on to something else. We have argued this long enough.

MR. CHRISTENSEN: All right, I take an exception to the ruling with respect to the denial of the admission in evidence of the facts offered to prove, and also an exception to the denial of the permission to offer the reports of the referees in both the case 3488 of "The Seal" and the case 3486 of the Motor Boat "A-1817." I regret that the gentlemen smart so much over those findings in that case.

MR. BALTER: I regret that counsel for the claimant cannot try his case on its own merits.

MR. CHRISTENSEN: Yes, but it is substantially the same.

WARD DANIELS,

recalled

REDIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q Mr. Daniels—

MR. CHRISTENSEN: I don't know whether I filed the subpoena in this case or not.

THE COMMISSIONER: It is here.

(Testimony of Ward Daniels)

MR. CHRISTENSEN: Well, there will be a return on it.

Q BY MR. CHRISTENSEN: Mr. Daniels, you in company with the process server in my office went down to the water front?

A Yes, sir.

Q Among the witnesses you were looking for *ward* Mr. Curwin, J. H. Curwin?

A Yes.

Q. The man from whom you bought the "'Rethaluleu"?

A Yes.

Q The investigator was sent down again afterwards to look for him, was he not?

A Yes, he was.

Q And you have been unable to find him?

A Haven't been able to find him at all.

Q That is what the investigator also reported this morning?

A Yes.

MR. CHRISTENSEN: That is all.

CROSS EXAMINATION

BY MR. BALTER:

Q Where did you go to look for Curwin?

A I tried to find the place of the home. I called once to see him at an address he had given me, and he was living at that home at that time, and I didn't have the address because I turned it over at the time the boat was taken to Mr. Doherty.

Q Where did you look?

(Testimony of Frank L. Morse, Sr.)

A I tried to find the street and address as near as my memory could direct me.

Q Where did you go?

A Well, I went out around Vermont and 56th and 54th, right in through there. That is as near as I could remember where it was.

Q You knew that Curwin's address on the license was 1663 Exposition Boulevard, didn't you?

A No, I didn't. The only address I had was the memorandum that I gave Mr. Doherty.

Q You had a copy of the license, didn't you?

A No, I didn't.

Q You had it available?

A No, I didn't. The only thing I have had was the bill of sale.

Q That is the only effort you made?

A No, while at the beach, I mean at San Pedro, I made inquiry trying to find him and whether he had been seen there.

MR. BALTER: That is all.

MR. CHRISTENSEN: Recall Mr. Morse.

FRANK L. MORSE, SR.,

was recalled, and having been previously sworn, testified further as follows:

REDIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q Mr. Morse, yesterday the government asked you if you would produce your cash books in which would be reflected an item of August 11 and September 1st,

(Testimony of Frank L. Morse, Sr.)

cash payments from Curwin in connection with the supplies and work on the "Rethaluleu".

A Yes.

Q Those items were of 1928?

A Yes.

Q You brought your cash book with you?

A Yes, sir, it is here.

Q Is there any correction you wish to make in your testimony as to the date of September 3rd?

A Well, I find in the book here it is entered under September 8.

MR. CHRISTENSEN: That is all.

CROSS EXAMINATION

BY MR. BALTER:

Q May I see that?

A Yes, sure; want me to find the pages for you?

MR. BALTER: Yes.

A There is one on page 53, that shows Curwin, by Walter, cash $600. That is the one of August 11.

Q Who paid you, Walter or Curwin?

A Walter.

Q Was his name Walter Curwin?

A No, W*at*er said, "This is the money on the Three Liberty Job" so I put down the name Curwin there and Walter, cash.

Q Who is Walter?

A Walter is the mechanic that was doing the work on the boat.

Q Is there anything between there and September 8?

(Testimony of Frank L. Morse, Sr.)

A No, I didn't find it. There is another one that is August 28, Curwin, cash $400.

Q What is the date?

A That is another book in there; that is a book I didn't have.

Q Would that be a more detailed specification of the work?

A No, I don't think so. The reason I saved this book it shows purchases and sales and profits, for matters of income tax for the government, so when you come in and check my income tax, this would show it. The other wouldn't.

Q But you have that book, haven't you?

A No, I haven't. It is a sort of a small cardboard ledger. Most of my business is done on a cash basis; practically all of it.

Q This item of September 11 is marked Curwin, Walters, cash received $600. I want to ask you a few questions. Your son testified yesterday that when he left—

MR. CHRISTENSEN: Just a minute, let me ask you, is this going to be further cross examination on what he went back on the stand for now?

MR. BALTER: On what you questioned him on yesterday; the general nature of the work. We could recall him ourselves, but this will probably expedite it.

MR. CHRISTENSEN: I just wanted to have the line marked.

MR. BALTER: No, it would be in the nature of recalling him ourselves.

(Testimony of Frank L. Morse, Sr.)

Q Your son*e* testified yesterday that about the middle of August he left the "Rethaluleu" as watchman and at that time the boat was practically ready for cruising.

MR. CHRISTENSEN: Just a moment. That question is improper as to what another witness testified. He may ask him himself about the fact.

MR. BALTER: I am cross examining and I have a right to phrase my question that way.

MR. CHRISTENSEN: I submit—

THE COMMISSIONER: Finish your question.

Q Now, I want the record to be clear as to the exact nature of the work you did. Do I understand you correctly when you say that the time that the motor boat—or at the time when you began to work on the "Rethaluleu" the boat was in Fellows & Stewart's yard?

A That is right.

Q And at that time, as far as you know, it may already have been cruising?

A Well, what time?

Q When you began to work on the boat.

A We began to work on the boat while it was in the shed.

Q When did you begin to work on the boat?

A Sometime in July; I think around the middle of July.

Q When did you finish the work?

A Well it dragged through, I think, almost the 1st of September.

Q During July and September?

A July and August.

(Testimony of Frank L. Morse, Sr.)

Q Well, from July to September. When you finally completed the work that boat was at various times in condition for actual cruising, was it not?

A Oh, yes. It was launched and in the water and was being tried out and tested.

Q As far as you know that boat may have been used for actual cruising, even though you hadn't finished your last work on it?

A I had no knowledge where they went with it, because I wasn't down on board all the time. You see my man was sent over simply as an assistant, and the fellow would work on the boat as this man Walter wanted him there, and if Walter got in difficulty he would come to the shop and say, "We took the boat out today and tried it out and some item was wrong; didn't work right".

Q He was more or less of a repair man on the overhaul job?

A Yes, my man was just doing tuning up work.

Q As far as you know the boat may have been out on long cruises and your man may simply have worked on repair work after it came back?

A No, it didn't go out on long cruises because I had an understanding with this fellow Walter that he was to pay for any material before the boat was taken away from the yard.

Q But you don't know whether he kept that understanding; he may have gone out as far as you know?

A He might have, but it wouldn't been more than a day or so, because I was over at Fellows & Stewart three or four times a week, and the boat was always there.

Q You didn't see it every day?

(Testimony of Frank L. Morse, Sr.)

A No.

Q It may have gone out for a day or two and come back?

A Yes.

MR. BALTER: That is all.

REDIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q Mr. Morse, you were there three or four times during July, August and September?

A Yes.

Q In addition to that, your boy was on there for six or seven weeks as a watchman.

A Yes.

Q You saw him on there as a watchman, didn't you?

A Well, he was over there at night. I just knew he was on the boat at watchman because—well, he told me, in the way of conversation.

Q In addition to that you had your mechanic that was there off and on during July?

A The mechanic was on the boat pretty steady, as I remember it, until about the middle of August, and then they had this trouble with the gasoline system and Walter came over to the shop and said he couldn't turn the engine over 800 revolutions, and then this mechanic, and then there was another man went over there, and that was sometime during the latter part of August, and, of course, I was checking up on the boat pretty close, because I figured if Walter was going to turn the boat over to Curwin or the owner, going out of his possession, I didn't know anything about where they were, their finances or anything, and I wanted to be sure I got my

(Testimony of Frank L. Morse, Sr.)

money, and if there was any question that they were going to try to put over anything, I told this fellow Lindley, I says, "Take off the gear shift lever or something off the motor so they can't run, I want to be sure of getting the money." I kept pretty close tab on the boat, as closd as possible, so there wouldn't be any danger of their, for example, going to San Francisco or San Diego or some place like that. I was over there and the boat was usually around there, and I says, "Where is the Three Liberty Job" and he says, "Well, they are out trying it out." We had a lot of trouble with the gasoline system, and they got a water pump and they got a Ford generator and put that on for gasoline pump. Walter worked that out.

Q Let me ask you, after the engines are installed in the boat, then you have to test them, don't you?

A Oh, yes, quite a little work then.

Q Until they have been thoroughly tested and the engines lined up correctly and all conditions satisfactory, the boat isn't taken to sea, is it?

A Not usually, because it is rather a hazardous thing to go to sea with a boat not in first class condition, and break down.

Q It is possible it might get water-logged, too, isn't it?

A. Well, yes. I don't know "water-logged," that would be caused by a leak in the boat.

Q If they tried to take it out before it was actually completed to the finest detail?

A Yes, it is usually customary with any boat I had anything to do with that you couldn't get your money out of it until it is satisfactory. You have got to prove

(Testimony of Frank L. Morse, Sr.)

to him you have made satisfactory installation and everything is 100%.

Q You know your mechanic was down there on this test?

A Oh, yes; I am sure of that.

RECROSS EXAMINATION

BY MR. BALTER:

Q What is the cruising radius of a boat of this sort?

A Frankly, I don't know how many gallons of gasoline that boat carries.

Q What would you judge?

A I would say this, that a cabin Liberty motored, turning maximum revolutions which is 1800, burns around 40 gallons of gasoline an hour. If you had three and they turned maximum speed, you would be burning 120 gallons of gasoline an hour. Now, if a boat carries, we will say, 100 gallons an hour to make it round figures, taking the boat carries 1000 gallons of gasoline, it would have 10 hours. If the motor turned slower, if they turned say 1200, they would use correspondingly less, probably 20 gallons an hour.

Q How far could it go on that?

A That would depend on the speed of the boat. A boat of that size, I should think, could travel a speed on the ocean where it is rough, with the motors turning around 1500 to 1600, ought to travel around 25 miles an hour.

Q Might in a test run with full capacity go 2000 or 2500 miles if it carries that much gasoline?

A Say the boat made 25 miles, why 250.

(Testimony of Frank L. Morse, Sr.)

MR. CHRISTENSEN: Just a minute. I want to object to the cross examination as immaterial and not pertinent to anything on redirect examination, and interjecting into the matter hypothetical questions.

THE COMMISSIONER: Not 2500; 250.

MR. BALTER: I mean 250.

A That is what puzzled me.

MR. BALTER: I would like his Honor to see these two entries. Will you open the book again?

(Book is handed to the Commissioner.)

THE COMMISSIONER: August 11 and September 8.

A There is a matter there of the $600 and then in September, $400. If these items had been in May, then this would have happened in May. That is all I have to go by.

MR. CHristensen; That is all we have, your Honor.

MR. SOMERS: You mentioned a motion to strike the testimony.

MR. CHRISTENSEN: Oh, yes.

MR. SOMERS: Are you abandoning that?

MR. CHRISTENSEN: No, I am not. Page 44 (indicating the deposition.) 44 I pass and go to 52; line 23, page 52. "Q—You say McCluskey was the skipper at that time? A—Yes." Object to it on the ground that the question is leading and suggestive and assumes a fact not in evidence; also calls for a conclusion of the witness.

THE COMMISSIONER: Deny your motion as to that. Taken with the context it indicates that the—

MR. CHRISTENSEN: Exception. Similar objection to the question on line 3, page 52.

(Testimony of Grace Allaman)

THE COMMISSIONER: Denied.

MR. CHRISTENSEN: Move to strike—well I make an objection to each of the questions appearing on page 55, line 17 to the end of the page, each question separately.

MR. SOMERS: On what ground?

MR. CHRISTENSEN: To line 4 on page 56, on the ground that each question severally is irrelevant and immaterial and not competent to any issue in the case.

THE COMMISSIONER: Denied.

MR. CHRISTENSEN: Has your Honor ruled?

THE COMMISSIONER: Deny the motion to strike.

MR. CHRISTENSEN: Exception, and the objection will also be considered a motion to strike?

THE COMMISSIONER: Yes.

MR. CHRISTENSEN: That is all.

MR. SOMERS: Have you rested on the case, Mr. Christensen?

MR. CHRISTENSEN: Yes, subject to this one thing: If we can locate Curwin, and we don't finish, I want to put him on the stand.

MR. BALTER: I wish you would.

MR. CHRISTENSEN: You don't know how anxious I am.

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GRACE ALLAMAN,

called as a witness in rebuttal on behalf of the Libelant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SOMERS:

(Testimony of Grace Allaman)

Q Please state your name.

A Grace Allaman.

Q By whom are you employed?

A *B*arbutt & Walsh.

Q In what capacity?

A Bookkeeper.

Q Do you also act as cashier?

A Yes.

Q You receive the money that is paid into the firm?

A Yes.

Q Have you brought, at my request, records concerning the payments to the firm for work done and supplies furnished to the Motor Boat "Rethaluleu"?

A Yes, they are on the chair.

(Papers handed to the witness.)

Q Directing your attention to December 5, 1928, I will ask you to refer to you records and read from them what you find the repairs were and the amount of money paid for such repairs upon the Gasoline Motor Boat "Rethaluleu".

MR. CHRISTENSEN: Just a moment. That is objected to if the Court please, as not rebuttal. There is nothing developed in the direct testimony on the subject at all. Whatever it was, was evidence on a collateral matter on cross examination and it is not part of their case in chief, rebuttal of nothing and impeachment of nothing.

THE COMMISSIONER: Overruled.

MR. CHRISTENSEN: The further objection that there is no foundation laid for the introduction in evidence by identifying items with reference to which the

(Testimony of Grace Allaman)

witness is asked, as items of payment on the particular boat involved here; no connection.

THE COMMISSIONER: That may be so. It would be incumbent upon the government to show that.

Q BY MR. SOMERS: Have you ever seen the Motor Boat "Rethaluleu"?

A Yes.

Q Within the period covered by the data which you have before you?

A Yes.

Q And you know of your own knowledge that your company did work on that boat?

A Yes.

Q And that charges were made for such work? And that charges were paid for the work done?

A Yes.

MR. SOMERS: I submit your Honor, we have covered it.

THE COMMISSIONER: Go ahead.

MR. SOMERS: There was an objection made to the last question.

MR. CHRISTENSEN: Same objection, incompetent, irrelevant and immaterial and on the grounds heretofore stated.

THE COMMISSIONER: Overruled.

(Last question read.)

THE COMMISSIONER: Better identify the records and let the record show whatever it may.

MR. SOMERS: I think that is a good suggestion, your Honor. I show you account No. 5, name "Rethaluleu", J. H. Curwin, 1663 Exposition Boulevard, Los

(Testimony of Grace Allaman)

Angeles. Then the paper shows rulings under date 1928, items, folio, debits, and then a red line and date, items, folio, credits. The first item appears under 1928, September 17, and the last item appears to be September 23, 1929. No, there was another boat. September 23, 1929 refers to the "Rethalcleu". I will ask you if the paper which I have spoken of is the original record of your company?

A It is.

Q BY MR. CHRISTENSEN: And this account number five that you have before you, you carry it in the name of the "Rethalulue"?

A Yes.

Q Is that in your handwriting?

A Yes.

Q You have underneath that "J. H. Curwin, 1663 Exposition Boulevard, Los Angeles"?

A Yes.

Q Did you enter that at the time you opened this account so you would know where to send the bills?

A Yes.

Q Did you write that yourself?

A Yes.

Q That was in September, 1928?

A Yes.

Q So you have continued it that way?

A Yes.

Q BY MR. SOMERS: I will have the original carbon sheets your Honor, and this is a summary. I move that the carbon copies be received in evidence. It covers the dates of December 7, 1928, December 26, 1928, De-

(Testimony of Grace Allaman)

cember 28, January 7, 1929, January 28, 1929, including January 31, 1929, February 6th and 8th, March 9th, March 23, 1929, April 4, 1929, September 23, 1929, as one exhibit, and then the resume; will your Honor give those a number?

MR. CHRISTENSEN: I want to inquire before those are received in evidence, if the court please.

THE COMMISSIONER: The list is 11 for identification and the yellow sheets will be 12 for identification and the ledger sheet 13 for identification.

MR. SOMERS: You may inquire now. We are not through with the witness.

MR. CHRISTENSEN: Well, go ahead.

MR. SOMERS: Well, we offer the sheets marked for identification, in evidence, your Honor.

MR. CHRISTENSEN: Well, they are objected to if the court please because there is no proper foundation under the issues of the case. In fact they reflect that items charged there were at the time the Coast Guard had the boat in possession.

THE COMMISSIONER: I will receive this ledger sheet marked Exhibit 13. The yellow sheets, what are those, the sheets that you make up the ledger from?

A Yes.

Q BY THE COMMISSIONER: They do some work and make up this record and it comes to you and you put that on here?

A They make up time sheets and turn them in and I copy from the time sheets onto these.

THE COMMISSIONER: Then they will both be received as Libelant's Exhibit 12, the yellow sheets, and 13 will be the ledger sheet.

(Testimony of Grace Allaman)

MR. SOMERS: We are making a separate offer your Honor, of the daily charges beginning September 7, 1928, and the closing, according to this record on November 27, 1928, and ask that be given the next number; offering them in evidence.

THE COMMISSIONER: 14.

MR. SOMERS: Q Do you remember the party who made the payments for the repairs shown on these exhibits?

MR. CHRISTENSEN: Well I think that is pretty broad to take in territory of a year and a half. There is no evidence that this one party made the payments. It is assuming a fact not in evidence.

THE COMMISSIONER: Overruled. You might make it "Party or parties".

MR. SOMERS: Yes, I so amend the question, your Honor.

A Yes, I remember one of them.

Q Do you think you would be able to identify him from his picture?

A I think I would.

Q I am going to show you particularly the first picture marked exhibit 1, attached to the depositions of the witnesses Kruger and Johnson filed in this court, and ask you if you recognize the party shown in that picture as the man who made the payments.

A That is the man.

Q Do you know him by name?

A No, I don't.

MR. SOMERS: The record discloses, your Honor, the identity of the party.

(Testimony of Grace Allaman)

Q Did he make, to the best of your knowledge, all of the payments or did anybody else pay on the account on this boat?

A I think he is the only one. I don't remember any one else.

Q What was his usual mode of payment?

A He always paid cash.

Q Always in cash?

A Yes.

Q I am going to direct your attention to Mr. Daniels, who is seated behind his counsel. Mr. Daniels has the blue suit on.

MR. CHRISTENSEN: Stand up, Mr. Daniels.

Q BY MR. SOMERS: Did Mr. Daniels ever appear in your office and make payments on this account?

A No.

MR. SOMERS: That is all.

CROSS EXAMINATION

BY MR. CHRISTENSEN:

Q How long have you been employed with Garbutt & Walsh?

A Almost eight years.

Q And on December 5th the boat was then at your place, was it, December 5, 1928; I say the boat was at your yards.

A December 5, 1928?

Q Yes.

A I don't remember.

Q Do you remember when it was taken away from your yards?

(Testimony of Grace Allaman)

A I couldn't tell without looking on the records. If I have a record of work being done on it, I know it was there, but otherwise, I wouldn't know.

Q Well, looking at those records, can you determine when that boat left your yards?

A December 7, 1928, apparently we sold some paint and made a footstool on the 19th, and on the 22nd she was hauled on the ways, and she would have to be there when she was hauled on the ways, so I know she was there that day, but as far as selling the paint and making the footstool, she wouldn't need remain there very long for that.

Q When would your record show was the last time it was in your yard?

A Apparently the last time we did any work on the boat was April, 1929; did some work on the generator, some electrical work on that day.

Q Are you the only cashier down there?

A I am the head cashier. I have an assistant, but I oversee everything.

Q Well, sometimes payments are received by your cashier?

A Yes, but they are all entered by me.

Q You don't always know who makes the payments except a payment comes and you have made a memorandum?

A Perhaps not always; practically always though.

Q A payment might be made by a party and a memorandum might get to your desk showing payment was made of a certain amount and you wouldn't know who the particular person was that made it?

(Testimony of Grace Allaman)

A Probably not.

Q Would you or wouldn't you?

A As I say, I usually know. It happens occasionally some one else takes the payment, or I am not there.

Q You have an assistant?

A Yes.

Q What are her duties?

A She helps me.

Q Are you the principal bookkeeper?

A Yes.

Q So you work together?

A Yes.

Q If you were busy on the books and a customer comes in and wants to pay, she gets it, that is about the way it works?

A Well, yes, but we have only a very small place and it is impossible for anybody to come in there without me seeing them.

Q Or when you would be out to lunch she would be there?

A Yes, it might happen during the noon hour.

Q Or your absence during the day from the office for any reason at all?

A Yes.

Q Well now, does this sheet show—what is this item, September 23rd, on Exhibit 13 indicate?

A I believe on September 23rd we sold an outboard motor. They said make a charge against the boat so I did; paid them cash for the motor.

Q Was that installed in your place?

A I couldn't say. I believe we did something to it.

(Testimony of Grace Allaman)

Q Then do you know whether that was some one from the Coast Guard that ordered this item? And made the payment?

A I know it wasn't anyone from the Coast Guard.

Q Did you know the boat at that time was in the custody of the Coast Guard?

A Yes.

Q Do you know whether it was anyone—do you know who the particular person was?

A Yes, I do.

Q Who was it?

A It was the same man that always made the payments on the "Rethaluleu."

Q That was on September 23, 1929?

A Yes.

Q Can you show me anything by your records that that motor was put in the "Rethaluleu?"

A No, nothing on there.

Q You had no work sheet there?

A I have a work sheet for the work done on the motor.

Q For September 23rd?

A Yes.

Q Let me see it.

(Paper handed to the attorney.)

Q What is an outboard motor?

A A small motor that is usually attached to the back of a skiff or some kind of a small light boat.

Q Or a dory?

A Possibly.

(Testimony of Grace Allaman)

Q Now, would that indicate to you, this item, with the things that are stated upon that sheet, that anything was done with that motor or with the "Rethaluleu" in your yards?

A Well, it indicates that apparently they installed the motor on something, but I think it was a skiff.

Q The skiff would have to be at your yards?

A The skiff would have to be at our yards. It has nothing to do necessarily with the boat "Rethaluleu" itself.

Q It would be a dory?

A A dory, yes. I told you the man, I don't know his name, he says, "Charge it to the boat 'Rethaluleu'". I had to charge it to something. He said charge it to the "Rethaluleu" and I did. The boat "Rethaluleu" wasn't necessarily there.

Q But the dory was?

A Yes, the dory would have to be there.

Q Would you be in the habit of letting somebody come in like this man that pays cash, and charge things and say, "Charge it to a certain boat, "without the boat being present, so you would have a lien on it?

A He paid cash for it; as soon as I made out the bill, I asked what name I should make it out to and he said the "Rethaluleu." He had paid cash there before I made the bill out.

Q He simply charged it to the "Rethaluleu"?

A I said, "What boat is this"? And he said, "Rethaluleu."

Q Did you know at that time it was in the custody of the Coast Guard?

(Testimony of Grace Allaman)

A Not necessarily, no. I knew it had been seized by the Coast Guard.

Q Prior to this date?

A Yes, but I didn't know it was still in custody.

Q You didn't know but what it had been released?

A Yes.

Q Let me have that sheet again. Now let me have the one on April 4th.

A 1929?

Q In other words as far as you know from this record, all you know is that a man came in and paid $268 for motors and told you to charge it to the "Rethaluleu;" that is all you know about that transaction on September 23rd?

A I guess that is right.

Q Now, the one of April 4th. Have you any independent recollection yourself of this small item here of $3.75 appearing on Exhibit—withdraw that. This last sheet, these were all marked as one exhibit?

THE COMMISSIONER: No, there are two exhibits, 14 and 12.

MR. CHRISTENSEN: It may be understood that it is the carbon sheet.

THE COMMISSIONER: Fix the date there.

MR. CHRISTENSEN: Exhibit No. 12, dated September 23rd.

Q Showing you the same exhibit, a sheet bearing date April 4th, have you any independent recollection as to what that item covered?

A I don't quite understand you.

(Testimony of Grace Allaman)

Q As to what it covered.

A From the records it is turning down a generator and working on some electrical work.

Q That is the charge made by the mechanic at your place?

A Yes.

Q That would indicate that a mechanic worked on it in your yards?

A Yes.

Q So that on the date of April 4th, you say the boat was then in your yards?

A I should think so.

Q Do you know how the item was paid, $3.75?

A Paid in cash.

Q Do you remember anything about the circumstances of that item that would lead you to say who paid it or whether it really was paid in cash, or do you just assume it because most of them were?

A I know all payments on that boat were made in cash. I don't remember anything in particular about this particular bill, but I do know that all were paid in cash.

Q As to this particular bill of $3.75, have you any independent recollection as to who actually paid that bill of $3.75?

A I don't remember anything about it now.

Q Referring back to the item of April 4th, that item reads, "Turning down generators;" what else?

A Undercutting armature and electrical work; gives the name of the workman and the amount of hours they put in.

(Testimony of Grace Allaman)

Q Now we turn to an item of March 23, 1929. Do you know whether or not that was done while it was on the ways in your place?

A There is nothing there to indicate it was on the ways. No, testing cooler and repairing muffler and removing batteries; that is all by mechanics. The rest is material furnished.

Q The total of the item for materials and labor was $15?

A Yes.

Q Did that indicate to you the character of the work on the boat as to whether that is what you might class as miscellaneous upkeep or odd jobs?

A It would look that way to me.

Q That item that appears as March 23 here, you say that is the item that appears on your ledger sheet incorrectly as of March 11, 1929?

A I think so. It is the only item of $15.

Q Now turn to the next item; that is on March 9th, on the carbon sheets. Where does that appear on this ledger account, Exhibit 13?

(The witness indicates.)

Q That was entered on March 18th.

A That was the last day the work was done.

Q That total item was a matter of $13.42?

A Yes.

Q That included services of some mechanics?

A Yes.

Q Also would that sheet indicate to you that was just ordinary maintenance work on the boat, miscellaneous?

A Well, it appears to be quite miscellaneous.

(Testimony of Grace Allaman)

Q Quite miscellaneous, doesn't it?

A Yes.

Q That include—

A Work on brackets for batteries, and exhaust lines and battery box.

Q Now then, when is the next?

A February 6, 1929.

Q That is $31.98. Where does that item appear on the ledger sheet?

A (Indicating) February 15th.

Q So these items that appear on these work sheets are not reflected as of that date upon your ledger sheet?

A Our intention is to generally have the date on the ledger sheet represent the last date on this sheet. Sometimes it don't work out that way.

Q So, as to when these items of work carried on the ledger sheet, to determine correctly when that was done, you would have to refer to these carbon sheets?

A Yes.

Q Then the item of February 15th, would be something rendered and done on February 6th, is that correct?

A Part on February 6th and part on February 15th. Separate item for the work that wasn't done by us, repairing tanks, apparently done on the 8th.

Q That is also miscellaneous?

A Yes.

Q Now the next one is under date of—

A January 7th and January 31st.

Q So the items for February, March and April aggregate, the first on February 6th, $3.75, plus the items on February 15th, taken together a total of $31.98;

(Testimony of Grace Allaman)

March 9th, $13.42; March 23rd, $15; and April 4th, $3.75?

A Yes.

Q Well now, when a boat is in your shop, we will say it is on the ways, it would be there during the months of February, March and April, there is always miscellaneous things of that kind that is done on the boat so that it won't deteriorate, is that correct?

A Always seems to be something that has to be done to a boat to keep it up.

Q Yes, to keep it in condition. Then your next sheet is the date January 7th, and continues down to January 31st. That is many miscellaneous items all aggregating $209.72. Now you have items here for the month of December of the dates commencing December—well, we will refer to the ledger sheet. You have a total charge, commencing from November 30th, down to and including January 31st of $378.46.

A Yes.

Q Now do you know whether that item was all paid at one time or on the different dates appearing?

A That was all paid at one time.

Q That would be January 31st?

A It was paid on February 7th.

Q That would be all the work from November 1st down to that time?

A Yes.

Q The payment having been previously made was on November 14, 1928?

A Yes.

(Testimony of Grace Allaman)

Q Now, that would indicate to you, would it not, since this work was done from November 30th to January 31, 1928, and the items not paid until February 7, 1928, that all of that time that boat was in your yards?

A Not necessarily, no.

Q Well, wouldn't you insist on the boat paying its account before it was released from your boat yards?

A We insist in large amounts as a rule, but small amounts like that sometimes we don't insist on it.

Q Do you know what it was with reference to this particular item, and your transactions that you had with the "Rethaluleu"—they were all cash payments, weren't they?

A They were all cash payments, yes.

Q Was any credit extended at all?

A Sometimes, for a short period.

Q Do you know whether any credit was extended on any of those items from November 30th to January 31st?

A Well, if we did work for him from November 30th to January 31st, and he didn't pay for any of it until February 7th.

Q Was the boat there all that time?

A I don't know.

Q It would indicate to you it was, by reason of the fact that the payment was delayed until that date?

A No.

Q Have you any independent recollection whether you gave any credit at all on any of these items?

A We never did anything about collecting any of them until the 10th of February, he paid the whole thing.

(Testimony of Grace Allaman)

I don't remember anything about whether the boat was there or whether the man was there. My boss probably told him it would be all right. I don't extend all the credit. Some people come to him and say they would like to go away a few days and he would say all right.

MR. CHRISTENSEN: That is all.

REDIRECT EXAMINATION

BY MR. SOMERS:

Q I think Miss Allaman I am responsible for the item appearing of record September 23 and September 24, under 1929. Will you, in bookkeeping terms, explain that entry. Does it merely show work done on that date, the account paid and the account closed?

A This was the material and labor furnished on this date. That would be the amount of the bill against him, and he paid it the next day, apparently.

MR. SOMERS: I think that is all. May the record show, your Honor, that the photograph which the witness has been identifying is the man who has been referred to in the record as John McCluskey?

THE COMMISSIONER: Yes.

Q BY MR. SOMERS: When you say cash payments, you mean that money was presented as adverse to a check?

A Yes.

Q And the method of doing business on this boat, was it or was it not cash in advance?

A No, not cash in advance.

(Testimony of Horace Anderson)

RECROSS EXAMINATION

BY MR. CHRISTENSEN:

Q Was it cash before the boat was permitted out of the yard?

A Not necessarily.

Q All these items I have shown you, you don't know whether the boat was in the yards or not when that work was done, or whether it was done by your mechanics and the supplies furnished at some other point?

A I know all the work done on the boat was done in our yards, because our mechanics don't go anywhere else.

Q Any material furnished would be furnished at your yard also; would be furnished at your yard to the boat at your yard?

A Well, not exactly. We would furnish material to the Captain of the boat to take somewhere else, I suppose.

MR. CHRISTENSEN: That is all.

MR. SOMERS: That is all.

(Whereupon an adjournment was taken until 2 o'clock.)

AFTERNOON SESSION

2:00 P. M.

HORACE ANDERSON,

called as a witness in rebuttal on behalf of the Libelant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SOMERS:

Q State your name, please.

A Horace Anderson.

Q What is your occupation?

(Testimony of Horace Anderson)

A Chief Boatswain, United States Coast Guard, Coast Guard Base, Section 17 at San Pedro.

Q Have you with you a record of the Section Base?

A Yes, sir.

Q Will you identify it and tell what it is?

A This is what is called the guard book.

Q Tell us what record are contained in the book.

A This is a record of the vessels and activities of the Harbor Patrol. In it is entered the names of the vessels that are found in the Harbor and Los Angeles, when the Harbor Patrol is made.

Q Between the months of July and November, do you know who made the records in the book that you have in your hand?

A It is made by the person that made the Harbor Patrol, and that person signed it.

MR. CHRISTENSEN: Move to strike as not responsive and also as being a conclusion of the witness.

THE COMMISSIONER: You can further qualify him, I presume?

Q BY MR. SOMERS: Will you hurriedly turn the pages of the book between July 30 and say October 15, and tell whether or not you recognize the handwriting on those pages. Start at July 30, that is pages 35 to 162 inclusive.

A Do you wish me to give the names on each day?

Q What year is that?

A This is 1928. Each day?

Q No, you won't have to say each day. Just say if you recognize the handwriting.

A Yes, I do recognize the handwriting.

(Testimony of Horace Anderson)

Q Make a complete examination within those periods.

A During that period the entries have been made chiefly by B. N. Hansen.

Q Are you familiar with his handwriting?

A I am familiar with his handwriting.

MR. SOMERS: We offer the record of the period I have indicated, your Honor, in evidence.

MR. CHRISTENSEN: Object if the Court please; no proper foundation laid for it, secondary evidence; it is hearsay, immaterial and irrelevant.

THE COMMISSIONER: As I understand it, the man that made these entries, it appears previously in the testimony he is now out of this district?

A Yes, he is now out of this district.

Q Isn't here at present?

A No, isn't here.

Q This record is a record that, as I understand it, is made from day to day and kept with the Coast Guard. It is in the form of a report, isn't it?

A That is it; it is a daily report.

Q A patrol boat visit—makes the trip around the harbor?

A Yes.

Q And makes note of all the boats that are in and what boats are not—that they do not find?

A Yes.

THE COMMISSIONER: I think I will let it in for what it is worth.

MR. CHRISTENSEN: Exception.

THE COMMISSIONER: It is unquestionable hearsay and I don't know that it comes under any particular

(Testimony of Horace Anderson)

exception to the hearsay rule, except that the record is offered much in the nature of a log. It is the record of a patrol boat, and in the absence of any better proof, we can probably receive it. I don't know what weight can be given to it. That depends upon a good many other matters.

MR. SOMERS: May I further identify the book, your Honor?

Q This is an official record of the Coast Guard?

A It is.

Q And is made, if you know, pursuant to instructions of the executive officer of that department on that date?

A Yes, sir.

THE COMMISSIONER: Well, that is the book that is kept by the man in charge of the boat that makes the Harbor Patrol?

A That is it exactly.

THE COMMISSIONER: It seems to me it is more or less in the nature of a log book. They are very generally accepted.

Q BY MR. SOMERS: It is your daily report?

A Yes.

THE COMMISSIONER: Any further direct examination?

MR. SOMERS: I think I will go a little further with this witness, your Honor, and have him testify as to whether or not the boat was observed to be in or out, so I can return the book to his custody.

MR. CHRISTENSEN: Well, you are not going to return it to his custody except over my objection. I am

(Testimony of Horace Anderson)

not going to stipulate. I haven't had a single stipulation with any of you gentlemen.

MR. SOMERS: Of course we will abide by the wishes of counsel in the matter, your Honor.

MR. BALTER: We have no objection to letting the guard book stay in the custody of the Court.

MR. SOMERS: You may inquire, Mr. Christensen.

CROSS EXAMINATION

BY MR. CHRISTENSEN:

Q Were you at the base July, August, September and October of 1928?

A I was. Of '28, no. I came to the base in October, 1928.

Q Do you know a man by the name of Irby?

A I do.

Q Was he there when you came there?

A He was.

Q How long did he remain after you came?

A He is there still.

Q Still there?

A Still there.

Q Do you know a man named Tucker?

A Yes, sir.

Q Still there?

A Still there.

Q Where is Hansen?

A He is in the northwestern division, I think it is Port Townsend, I am not certain, but he isn't here in this division.

Q Ellis?

A Ellis is here.

(Testimony of Horace Anderson)

Q Let me ask you this, of course when you came there in October, you didn't know how these men operated of course during the months of July, August and September of that year, did you; you don't know whether they were on duty for consecutive days or not?

A Well, I don't know that, but the duties are continued on each day; the usual custom.

Q Of these patrols?

A Yes.

Q Do you know the handwriting of Irby and also Tucker?

A I do, sir.

Q Looking at page 43, can you tell me whose handwriting that is?

A Looks like Tucker's.

Q Can you tell me whose handwriting it is on page 51?

A That looks like Hansen's.

Q And Page 50?

A I am not sure, but it looks much like Irby's. Yes, either Irby or Tucker.

Q And the other one looks like Hansen?

A The other one looks like Hansen, yes.

Q Those are distinct handwritings, aren't they, the ones on page 50 and 51?

A Yes.

Q Looking at page 52 and page 53, can you tell whose handwriting that is?

A That looks like Hansen's. It is the same handwriting.

Q What is this; can you tell me whose handwriting that is on 54 and 55?

(Testimony of Horace Anderson)

A I give up. They are so much alike that I don't know.

Q The truth of the matter is they look so much alike you can't tell the difference between Irby, Ellis and Tucker?

A I can tell the difference. I have seen them enough to know that.

Q Are you able to tell now? I will take another sample. The truth of the matter is, Anderson, isn't it, that you can't tell really which one of these handwritings is in the book without reference to the name in the book?

A Probably so, because they are so much alike, but I am perfectly acquainted with the signature of these men, and each man that signed the name will sign his report as to activities of the trip.

Q Some of these aren't signed.

A Probably there are two pages for the same day.

Q Calling your attention for instance, to pages 38 and 39, those are the same day and they are not the same.

A That is true.

Q Do you know what the F and S stand for?

A Fellows and Stewart.

Q That is possible. You came here in October?

A I am acquainted with Fellows & Stewart many years ago, but I haven't looked through this book, all of it. I have seen them make entries in that book.

Q You saw them make entries in this book after you got here in October?

A Yes, this book or other books just exactly like it.

Q When did you come in October?

(Testimony of Horace Anderson)

A I was ordered here—I was detached October 1st and I reported in at the Base I think it was October 15, I am not sure, but something like that.

Q Well, now, isn't it a fact that taking here from October 4, that you don't see on any pages from 148 to 159, which is October 12, October 4th to 12th, any initials F & S?

A There is Fellows & Stewart (indicating.)

Q But no initials F & S. I am just asking you. There aren't any?

A I haven't had time to examine it. You said it is so, and I assume it is.

Q I want you to look. Fellows & Stewart, Fellows and Stewart, all written out.

A Yes.

Q Look at the next page 148 and 149. The other pages were 146 and 147, 145 and 144, 150 and 151. It is all the same, isn't it; 152 and 153.

A Yes.

Q 154 and 155?

A Yes.

Q 156, 157, the same isn't it? 158, 159, the same isn't it?

A Fellows & Stewart, you have reference to, yes.

Q That is all written out.

A Yes.

Q Let us look there and see if we find anything otherwise in this book. Follow these pages, 160 and 161; look at it; 162 and 163; 164 and 165; 166 and 167.

MR. SOMERS: Counsel is going now beyond the limit of the offer, your Honor.

(Testimony of Horace Anderson)

MR. CHRISTENSEN: I am looking again at pages 186 and 187, that is the date of November 1st, 1928. That carries Fellows & Stewart written out, doesn't it?

A Sure.

Q The last page of the book, November 15, 1928.

A Fellows & Stewart.

Q Written out?

A Sure.

Q So, as long as you were at that base while this particular book was used, did you see this book during that time in October while you were at the base, and November, this particular book; did you have any occasion to see it?

A The man that wrote the book was sitting at the same desk I was sitting at. In fact he often used my desk for writing out his notes.

Q Did you have anything to do with this?

A No, I had nothing to do with this.

Q In whose charge is this book now?

A It is in my custody now.

Q Down there?

A No, it is in the custody of the executive officer down there.

Q You got it from the executive's office?

A Yes.

Q In fact these books have never been under your custody and control as an individual; wasn't part of your duties at all to have charge of these books?

A No.

Q He simply gave you this book to bring down here?

(Testimony of Horace Anderson)

A Yes, that is the record of the activities of the vessels.

Q You went on patrol when?

A I have made a patrol a couple of times with Hansen, but as a usual thing I don't go on the patrol.

Q So you, of your own knowledge then, don't know, isn't that true, what these various initials that are set down like F and S and other initials in this book are, do you?

A I don't know?

Q You don't know of your own knowledge what they mean?

A Why of course I do.

Q Isn't it a fact that you simply infer that the F and S that you find in here means Fellows & Stewart?

A If I see your name and initials I assume—

MR. SOMERS: We haven't asked the witness to interpret the document.

Q It is just this, I mean it is assumption on your part?

A Well—

MR. CHRISTENSEN: I now move to strike the guard book from the record on the ground there is no sufficient foundation laid for its introduction, secondary evidence and no sufficient foundation laid of authenticity, and the witnesses are available.

THE COMMISSIONER: Denied.

MR. CHRISTENSEN: Exception.

(Libelant's Exhibit 15 in evidence.)

(Testimony of L. H. Williams)

REDIRECT EXAMINATION

BY MR. SOMERS:

Q In the absence of the Chief Executive Officer at the Base, who is in charge and in control and has custody of the records?

A In the absence of the executive, I am his successor.

MR. SOMERS: That is all, Mr. Anderson. Mr. Williams.

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L. H. WILLIAMS,

having been previously sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. SOMERS:

Q You are the Mr. Williams who has been previously sworn and testified in this case?

A Yes.

Q And at that time you stated you were a Coast Guard Officer?

A Yes, sir.

Q Have you the record made by yourself of the Coast Guard vessel of vessels of your command?

A Yes, sir.

Q And what record is that?

A Boat log. It is the log of patrol boat 257.

Q Directing your attention to the month of August, 1928, directing your attention particularly August 23rd, I will ask you if you on that date had some official business with the Triple Gas Screw Motor Boat "Rethaleleu"?

(Testimony of L. H. Williams)

A Yes, sir. I boarded her at 5:30 in the morning and looked her over for violation of the Customs law.

Q Where?

A Near the San Pedro lighthouse.

Q How far from Fellows & Stewart's shipyards, let us say approximately.

A Approximately 4 miles.

Q How far from the breakwater?

A A quarter of a mile.

Q This boarding took place practically just inside the breakwater?

A Yes.

Q Was the "Rethaluleu" at that time headed in or out to sea; in from the sea or out to sea?

A She was headed in.

Q You did make an inspection as to violation of the Customs law; did you find at the time of your inspection the Customs law was being violated?

MR. *CHRISTENSE*: Just a minute; objected to as a conclusion of the witness.

THE COMMISSIONER: Sustained.

Q Was the boat at that time in running condition?

A Yes.

THE COMMISSIONER: What date was that?

A August 23, 1928.

Q BY MR SOMERS: Describe the condition of the boat as you observed it.

A Around the lighthouse they were making about 25 miles an hour and I gave the signal to stop; gave the signal by the whistle to stop and she didn't stop immediately and I ordered the men to take the cover off the

(Testimony of L. H. Williams)

one pounder so I could fire a blank signal to her, but she came to a halt before I fired the blank.

Q What did you find on board?

A There was a Master and three men.

Q Do you know the names of the men now?

A I only would know the name of the Master; I didn't care about the others.

Q What was his name?

A Johny McCluskey.

Q You made an official recordation of that boarding, did you, Boatswain?

A Yes, sir.

Q And set it out in your log?

A Yes, sir.

MR. SOMERS: That is all.

CROSS EXAMINATION

BY MR. CHRISTENSEN:

Q You gave the signal to stop, a whistle, and it did stop, Captain?

A Yes, sir.

Q How far were you away from the boat when you first signalled it?

A About 150 yards.

Q You were behind it?

A A beam of it.

Q It takes the boat a little time before it pulls to a stop?

A Well, she ran on some distance before she stopped.

Q Now, the boat was inside the breakwater going in a northerly direction, is that right; that is the way you were going, to get into the harbor; isn't that correct?

(Testimony of L. H. Williams)

A Well, I wouldn't know the exact direction. It would be northwesterly direction, I would assume; I would think, without looking at the chart.

Q Immediately below that in a southeasterly direction would be Long Beach?

A Southeasterly direction would be on a course for the Coronado Islands, or just outside of them; would be quite a bit outside of Long Beach course.

Q The point I am getting at is this, that if they were going in a northwesterly direction that would be running in a direction that would be immediately contiguous and adjoining the shore line?

A I think that a westerly direction would be parallel with the shore line.

Q Would that be a shore line that would be running in a southerly direction down toward Long Beach? From the lighthouse isn't it a fact that Long Beach would be in a southeasterly direction from the lighthouse?

A Almost east.

Q Maybe east by a little south?

A You are assuming the coast line runs north and south. It runs more east and west in there.

Q Well, do you know who these other men were?

A No.

Q The boat was stopped and you got on?

A Yes, sir.

Q How long were you on the boat?

A About 10 minutes.

Q Talk to the men?

A Only talked to the master.

(Testimony of L. H. Williams)

Q Then you let the boat go?

A Yes.

Q You don't know whether these men were out there testing or tuning that engine or that boat or not, did you as a matter of fact?

A I don't know what they were out there for.

MR. CHRISTENSEN: I guess that is all.

REDIRECT EXAMINATION

BY MR. SOMERS:

Q You have stated the time of the visit have you to the boat; did you state the hour?

A 5:30.

Q Morning or afternoon?

A Morning.

MR. SOMERS: Let the record show that the log is delivered to the Boatswain.

MR. SOMERS: We now, your Honor, do offer constructively in evidence the Triple Gas Screw Motor Boat "Rathaluleu" and ask your Honor to make an inspection of the boat. I will not go further along that line without your Honor's direction.

THE COMMISSIONER: I will go down and look at it if there is anything to be gained by it.

MR. SOMERS: We feel there is, your Honor, and we strongly urge it.

THE COMMISSIONER: How do you feel about it, Mr. Christensen?

MR. CHRISTENSEN: Well, I don't know whether there is anything particular to be gained from going down and inspecting the boat, and I think you will

(Testimony of L. H. Williams)

find it in rather a different condition than it was a year and a half ago. It is quite remote in time.

MR. BALTER: We think it is very much worth while, your Honor, because it is the theory of the Government all along in this case that it was constructed especially for rum running and no other purpose. There is an extra large cargo space in the boat and that can be used for anything, to hold contraband or otherwise. The boat is constructed differently than any ordinary speed boat seen around the Harbor, and I think it is worth while for your Honor to make an inspection of the boat and see what we are talking about and we would be glad to cooperate with counsel and yourself to arrange the trip whenever your Honor sees fit.

MR. CHRISTENSEN: I think counsel is assuming a good deal.

MR. BALTER: That is just a statement; not evidence.

THE COMMISSIONER: Well, we will pass that matter now. If you feel there is anything to be gained by making an examination of the boat, I will go down and look at it.

MR. BALTER: We certainly do. We wouldn't make the statement if we didn't feel like it.

THE COMMISSIONER: All right; we will arrange it later.

MR. BALTER: Thank you, your Honor.

MR. SOMERS: Otherwise we rest.

(Testimony of Ward Daniels)

WARD DANIELS,

the Claimant, was recalled as a witness in his own behalf, having been previously sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q I believe yesterday you testified you first saw the "Rethaluleu" about the 1st of December, 1928?

A I did.

Q And at that time there was a man there who was a mechanic?

A Working on the boat, yes, sir.

Q What was the condition of the boat with reference to any engine being drawn or any work being done on the engine?

MR. SOMERS: Objected to as leading.

THE COMMISSIONER: Not seriously so.

A It had one motor partly *turn* down.

Q Was that the condition of it on the 5th day of December?

A They were still working on it. In fact they were putting in a new cam-shaft.

Q Was there any understanding that you had with reference to the completion of the work?

A Of course, it had to be completed. That was the understanding I had anyway.

Q There was work done on the boat after you bought it?

A Well, they had to complete what they had undone. They were putting in a new cam-shaft and they were tearing down the motor at that time, to put in the new

(Testimony of Ward Daniels)

cam-shaft; in fact, put the motor in shape. What else was to be done, I didn't know at that time.

MR. CHRISTENSEN: That is all.

CROSS EXAMINATION

BY MR. BALTER:

Q You paid $9500 cash on December 5?

A I did.

Q Before any of this work was done?

A Yes, sir.

Q You took the word of somebody you never saw before that they would complete this work?

A I did.

Q Did you estimate how much work this would be?

A No, I did not. It wouldn't be very much.

Q It only had one motor in it when you saw it?

A It had three motors in it.

Q I understood you to testify that it only had one motor partly torn down.

A Yes, they had the head off it and taking the cam out to put in a new cam.

Q Did you make any written agreement with anybody about this work?

A No, I didn't.

Q How did you know they would do it?

A I knew they would.

Q How; you never saw these people before?

A I would take chances on it.

Q And pay $9500 cash?

A Yes.

Q Yesterday when you were asked in chief whether there was any work done on the boat after December 1st, you said no.

(Testimony of Ward Daniels)

A I didn't order any work done on the boat. You asked if I had any work done on the boat. I didn't.

Q Still you knew about this testimony?

A I did.

Q You made no other statement as to that?

A I didn't have anything to do with it.

Q You expected to take liberty on that boat and use it?

A No, sir.

Q Didn't you testify you wanted to use that?

A I wanted to use it as soon as I could get it turned into a cruiser, the kind of boat I wanted.

Q When did you expect this work to be completed?

A It would take about 2 months.

Q Were you familiar with the fact work was done on the boat in September 1929?

A No.

Q Did you expect the work to take that long?

A No.

MR. CHRISTENSEN: I want to object to that because he is assuming a fact not in evidence, that there was any work done on this boat in September, 1929.

Q BY MR. BALTER: When did you go down and take the liberty on that boat?

A I took the liberty as soon as I received a bill of sale, but the boat wasn't touched. They were then working on it.

Q You made no agreement as to the work being done or anything of that sort?

A I did not; none that I can show.

MR. BALTER: That is all.

(Testimony of Ward Daniels)

REDIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q You never paid an item then for work from November 30, 1928, to January '29, of $209.72?

A No, I didn't.

Q I note on exhibit of the Libelant, No. 13, the ledger sheet an item of February 15 of $31.98; an item of March 18 of $13.42; making a total of $45.40; another item March 11 $15.00; and one of April 4, $3.75, making a total of $18.75; approximately $64 and some cents for miscellaneous items in February, March and April. Did you pay those items?

A No. I myself didn't pay them, and I didn't give any orders to have anything done. The only orders I have given was just to take care of the boat, and if anything was done, I don't know anything about it.

Q How did you pay him?

A How do you mean?

Q McClumskey?

A You mean in salary or what?

Q Did you pay him money?

A I didn't pay him anything. In fact I owe him some money.

Q Directing your attention to September 23, 1929, where was the boat?

A At the Coast Guard Base.

Q You ordered nothing for the boat?

A No.

Q It was in the custody of the government at that time?

A Yes.

MR. CHRISTENSEN: That is all.

(Testimony of Ward Daniels)

RECROSS EXAMINATION

BY MR. BALTER:

Q Did you make any arrangement with Garbutt & Walsh for paying for work after you bought the boat?

A I did not.

Q For work McClumskey and Curwin were supposed to do?

A Give me the question again?

Q Did you make any arrangements with Garbutt & Walsh?

A No, I didn't.

Q As to the work McClumskey and Curwin promised to do on the boat?

A I didn't have anything to do with it.

Q Who promised to do the work?

A Mr. Curwin promised to finish the boat and have it *the in* shape I expected it to be in.

Q Did you ever stop credit on the boat at Garbutt & Walsh?

A I did not.

Q Then you didn't care how much work was done on the boat, even though it might be a lien on your boat?

A I did not.

MR. BALTER: That is all.

REDIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q You, of course, know something about Liberty motors?

A Yes, sir.

Q From your flying experience?

A Yes.

(Testimony of Ward Daniels)

Q And the condition in which you found the motors at that time, was there anything particular of any consequence that had to be done?

A Nothing at all. That is why I wasn't interested. I saw a new cam-shaft there and a cam-shaft was to be replaced and tuned up.

MR. CHRISTENSEN: That is all.

RECROSS EXAMINATION

BY MR. BALTER:

Q Garbutt & Walsh were supposed to fix that cam-shaft?

A I don't know who was supposed to fix it. There was a mechanic working on it.

Q You don't know who it was?

A No.

MR. BALTER: That is all.

MR. CHRISTENSEN: That is all.

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THE COMMISSIONER: How do you wish to submit this matter?

MR. CHRISTENSEN: Does the Court wish to hear argument on the matter or shall we submit a memorandum in lieu thereof?

THE COMMISSIONER: I expect you had better submit a written memorandum and any authorities you may wish to offer, and any particular points that you want specific findings upon.

MR. CHRISTENSEN: How many days do you folks want?

MR. BALTER: Do you want us to open?

MR. CHRISTENSEN: Yes, you may open unless you want to waive the opening.

MR. SOMERS: I think 10 days, your Honor, to open.

MR. BALTER: 10, 10 and 5.

THE COMMISSIONER: That is quite a while. Of course this matter has been delayed so long now that probably a few more days won't make much difference.

MR. BALTER: 15, 15 and 5.

MR. CHRISTENSEN: That is all right.

THE COMMISSIONER: Better make it 10, 10 and 5, and try to get it in. Here is Exhibit 11 for identification that was not offered in evidence.

MR. SOMERS: That may be withdrawn.

THE COMMISSIONER: You had this marked "B" for identification.

MR. CHRISTENSEN: I thought I offered it.

THE COMMISSIONER: If you did offer it, I didn't mark it.

MR. SOMERS: Do you offer it?

MR. CHRISTENSEN: Oh, yes.

THE COMMISSIONER: We will mark it then as your Exhibit B.

(Claimant's Exhibit B in evidence.)

MR. SOMERS: Will your Honor read the date and signature attached?

THE COMMISSIONER: Yes, marked March 14, 1929, from the Wilmington Boat Works to Ward Daniels.

(LIBELANT'S EXHIBIT 2) Page 42 License Oaths.

"OATHS FOR LICENSE OF MERCHANT VESSEL OR YACHT UNDER 20 TONS NET.

OWNERSHIP OATH.
(revised Statutes Section 4320)

District of

Port of

I, J. H. Curwin, of Los Angeles, in the County of Los Angeles, and State of California, swear, according to the best of my knowledge and belief, that the Gas screw Yacht called the Rethaluleu, of Los Angeles, official number of 23 gross and 16 net built in 1928, at Los Angeles, Calif. of wood as appears by No. issued at

19, now surrendered

Certificate of Homer Evans, Principal Carpenter, Fellows & Stewart, Builder, is wholly the property of citizen of the United States of America, owning and residing as follows:

J. H. Curwin,

1663 Exposition Blvd. Los Angeles, Calif.

and that the vessel is of the further description given in the License. So Help Me God.

J. H. Curwin,
Managing Owner.

Sworn to before me this 27 day of July, 1928.

Carl O. Metcalf
Deputy Collector of Customs.

(LIBELANT'S EXHIBIT 3)

"MASTER'S OATH—LICENSE OR MERCHANT VESSEL OR YACHT UNDER 20 TONS NET. (Sec. 4320 Rev. Stat.)

I, John McCluskey, master of the Gas screw Yacht called the Rethaluleu, do swear that I am a citizen of the United States, having been born in California, and that the License bearing No. 2, and date July 30, 1928, granted to said vessel by the Collector of Customs for the District of Los Angeles shall not be used for any other vessel or for any other employment than the COASTING TRADE, or in any trade or business whereby the revenue of the United States may be defrauded, and that the vessel is of the further description given in the license. So Help Me God.

John McCluskey, Master.

Sworn to before me this 27 day of July, 1928.

Carl O. Metcalf,
Deputy Collector of Customs.

Page 43 of License Oaths."

(LIBELANT'S EXHIBIT 5)

"OATHS FOR LICENSE OF MERCHANT VESSEL OR YACHT UNDER 20 TONS NET.

OWNERSHIP OATH.
(Revised Statutes, Section 4320.)

District of Los Angeles, Cal. 27
Port of Los Angeles, Cal.

I, Ward Daniels, of Pasadena, in the County of Los Angeles, and State of California, swear according to the best of my knowledge and belief, that the s/s yet called the Rethaluleu, of Los Angeles, official number

227860 of 23 gross and 16 net built in 1928 at Los Angeles, Cal. of wood, as appears by P. Y. L. No. 2, issued at Los Angeles, Cal. July 30, 1928, now surrendered, Property changed, is wholly the property of citizen of the United States of America, owning and residing as follows:

Ward Daniels, 43 S. Marengo Ave. Pasadena.

and that the vessel is of the further description given in the License. So Help Me *Go*.

Ward Daniels,
Managing Owner.

Sworn to before me this 5th day of December, 1928.

B. F. Witt,
A. D. Deputy Collector of Customs.

Page 98 License Oaths."

(LIBELANT'S EXHIBIT 6)

"MASTER'S OATH—LICENSE OF MERCHANT VESSEL OR YACHT UNDER 20 TONS NET. (Sec. 4320, Rev. Stat.)

I, John McCluskey, master of the s/s called the "Rethaluleu," do swear that I am a citizen of the United States, having been born in California and that the License bearing No. 17 and date December 5, 1928, granted to said vessel by the Collector of Customs for the District of L. A. No. 27 shall not be used for any other vessel or for any other employment than the COASTING TRADE, or in any trade or business whereby the revenue of the United States may be defrauded, and that the vessel is of the further description given in the license. So Help Me God.

John McCluskey, Master.

Sworn to before me this 5th day of Dec. 1928.

B. F. Witt,
A. D. Deputy Collector of Customs.

Page 98 License Oaths.

(LIBELANT'S EXHIBIT 8.)

"0000 to 0900. Southwest to wess breeze; hazy; moderate sea; course 145 deg. p.s.c. Speed 900 rpm. 0230 Changed course 243 deg. p.s.c. Speed 800 rpm. 0300 slowed engines to 700 rpm. account of sea. 0415 changed course to 303 deg. p.s.c. 0515 changed course to 80 deg p.s.c.

0800. Sighted two ships dead ahead about 6 miles distant. 0840 close to ships, sighted speed boat near one. Increased speed to 1100 rpm. started in pursuit of speed boat, which made off in westerly direction about 30 mph. 0845 opened fire with one pounder. Continued firing at speed boat until 0900. 0900 Bearing burned out in starboard engine and heads cracked leaving only one engine available. Ceased firing and observed direction speed boat pursued until out of sight. Communicated with base. So ends watch. M. C. Mason, CBM (a)

1900 to 1200. West breeze; hazy; moderate sea. 0905 Reversed course and proceeded back to mother ships which proved to be schooner Przmysl of Hamburg, Germany, and L'Aquila of London. They were then under way W x S. Excorted them until 11:40 speed 4 mi. per hour. 11:40 Received orders from Section Base 17 to return to base. Course 340 deg. p.s.c. speed 700 rpm. on one engine. So ends watch. M. C. Mason, CBM (a)

1200 to 1800. West to northwest breeze; hazy; rather rough sea. Cruising on one engine. Course 340 p.s.c. Speed 700 rpm. So third watch. No suspicious vessels sighted. M. C. Mason, CBM (A)."

[Endorsed]: Filed Sep. 27, 1930 R. S. Zimmerman, Clerk, by M. L. Gaines, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

DEPOSITIONS OF:

ERIC OLAF JOHNSON and WALTER KRUGER,

Taken on Behalf of Libelant, at San Pedro, California, on June 5, 1929, before Ray E. Woodhouse, Notary Public.

BE IT REMEMBERED: That, pursuant to the Notice hereunto annexed, and on Wednesday, June 5, 1929, commencing at the hour of ten o'clock a. m., at United States Coast Guard Base No. 17, in the city of San Pedro, County of Los Angeles, State of California, before me, Ray E. Woodhouse, a Notary Public in and for said Los Angeles County, duly appointed and commissioned to administer oaths, etc., personally appeared ERIC OLAF JOHNSON and WALTER KRUGER, witnesses produced on behalf of the Libelant in the above entitled action now pending in said court; and said witnesses, being by me first duly sworn, were examined and interrogated by Emmett E. Doherty, Esq., Assistant United States Attorney for the Southern District of California, appearing as proctor for the Libelant, and cross-examined by J. W. Kearby, Esq., appearing as proctor for the Respondent, and said witnesses deposed and testified as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the depositions of the above named witnesses may be taken de bene esse on behalf of the Libelant at United States Coast Guard Base No. 17, in the City of San Pedro, County of Los Angeles, State of California, on Wednesday, June 5,

(Deposition of Eric Olaf Johnson)

1929, commencing at the hour of ten o'clock a. m. of said day, before Ray E. Woodhouse, a Notary Public in and for the County of Los Angeles, State of California, and in shorthand by said Notary.

(It is further stipulated that the depositions, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said depositions, and that all objections as to materiality, relevancy and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof are hereby expressly waived.)

ERIC OLAF JOHNSON,

called as a witness on behalf of the Libelant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOHERTY:

Q What is your name?

A Eric Olaf Johnson.

Q Of what country are you a citizen?

A Sweden.

Q You were formerly a member of the crew of the motor schooner "Przemysl"?

A Yes.

Q Where did you sign on that vessel?

(Deposition of Eric Olaf Johnson)

A At the Panama Canal.

Q Who was the boatswain on board that vessel when you signed on?

A His name is Kruger.

Q Walter Kruger?

A I don't know his first name.

Q Was he a German boy?

A Yes.

Q What cargo was on the vessel when you signed on?

A Alcohol.

Q Do you know how many cases?

A About twenty-five or thirty thousand cases.

Q Where did the "Przemysl" proceed from Panama?

A We were supposed to go to Vancouver, but we never come to Vancouver.

Q Where did you go from Panama?

A We went outside and stopped outside.

Q Did you discharge the cargo? What did you do with the cargo?

A The speedboats came to take it, to bring it to the shore; the speedboats.

MR. KEARBY: I don't understand you.

A The speedboats came alongside the schooner to bring the cargo ashore.

Q BY MR. DOHERTY: Do you know the names of any of the speedboats?

A Yes.

Q What are the names of some of them?

A The "Rethalulew" is one.

Q When did you first see the "Rethalulew"?

(Deposition of Eric Olaf Johnson)

A The 1st of August.

Q Of what year?

A 1928.

Q What date was it when you signed on this ship, the "Przemysl," at Panama?

A The first of June.

Q 1928?

A 1928.

Q When you first saw the "Rethalulew" who was on board?

A Four men were on board the "Rethalulew."

Q How many times did you see her?

A About twenty to twenty-five times.

Q During what month of the year did you see it?

A In August, September, October and November.

Q When you first saw it, who was on board?

A There was Tony, John, Charley and George.

Q That was the first time you saw it?

A Yes.

Q When was that?

A That was about the first of August.

Q 1928?

A Yes.

Q Where was the "Przemysl" at that time?

A I can't tell just what the position was.

Q Were you under way? Was the "Przemysl" under way?

A It had stopped.

Q You had stopped?

A Yes.

Q Were you hove to or were you anchored?

(Deposition of Eric Olaf Johnson)

A No; we never dropped our anchors that time. We just stopped the motors.

Q Were you drifting?

A Yes.

Q Were you out of sight of land?

A I don't know how long we had been from land.

Q Could you see land?

A No.

Q You don't know where you were?

A No.

Q How long did it take you to get from Panama up to that position?

A I think it was about three weeks.

Q I will show you a picture and ask you if you have seen that man before.

MR. KEARBY: I will object to your showing him the picture. Let him describe the man first, if he can. Let him describe Tony, Johnny, Charley and George first. If he can identify them, then he may do so by the pictures. I would like a description of the men instead of showing him the pictures and saying, "Did you see this man on board?"

MR. DOHERTY: I was going to lay a foundation by asking him if he had seen that man before, and then asking him the circumstances.

MR. KEARBY: I am objecting to him being shown the pictures of any of these men who were supposed to be members of the crew of the "Rethalulew" or the "Przemysl." He may describe any man he claims to have seen on either boat, but I am going to object to any

(Deposition of Eric Olaf Johnson)

pictures being shown him in advance of his describing them.

MR. DOHERTY: The record will show your objection.

MR. KEARBY: Yes.

Q BY MR. DOHERTY: I show you a picture and ask you if you have seen that man before.

A Yes; I have seen him before.

Q Where did you see him?

A I seen him on the speedboat.

MR KEARBY: I want the record to show he hasn't looked at the picture; that he has identified it without even looking at it. You put it on the table and he didn't even look at it.

MR. DOHERTY: The picture is in front of the witness, and the witness is sitting at the table, and the picture is not more than two feet away. The man can see, and he can see the picture. I don't object to any reasonable objections, but I don't like to get into quibbling or we will never finish this.

MR. KEARBY: I am not going to quibble with you, but the witness never looked at the picture.

Q BY MR. DOHERTY: Pick it up in your hand, Mr. Johnson, and look at that picture. You have the picture in your hand, have you not?

A Yes.

Q Do you know the man whose picture you have seen?

A Yes.

Q Who is he?

A That is Johnny.

(Deposition of Eric Olaf Johnson)

Q Where did you first see him?

A I seen him the first time the speedboats came out.

Q Came out where?

A Came out alongside the schooner.

Q When you say the schooner, what is the name of the boat?

A The "Przemysl."

Q Did you say that Johnny came out alongside the "Przemysl" in a speedboat?

A Yes.

Q When was that?

A The first of July.

Q Of what year?

A 1928.

Q What boat was he in?

A The "Rethalulew."

MR. DOHERTY: I offer this picture, to be marked Libelant's Exhibit No. 1.

(Photograph marked Libelant's Exhibit 1 and hereto attached.)

Q Who was with him at that time?

A Three other men.

Q I will show you another picture.

MR. KEARBY: I make the same objection to this. I would rather he would describe the men first. I will make the same objection.

Q BY MR. DOHERTY: I will show you a picture and ask you if you have seen that man before.

A Yes; I have seen him before.

Q When did you see him first?

(Deposition of Eric Olaf Johnson)

A The same time as the other man.

Q Where were you when you saw him? Where were you when you saw his man for the first time?

A I was on board the schooner.

Q How did he come out to the schooner?

A He came out on the speedboat.

Q What speedboat did he come on?

A The "Rethalulew."

MR. DOHERTY: I offer this picture to be marked as Libelant's Exhibit No. 2.

(Marked Libelant's Exhibit No. 2 and hereto attached.)

MR. KEARBY: I will make the same objection.

Q BY MR. DOHERTY: I show you another picture and ask you if you have seen that man before.

A Yes, I have seen him before.

Q What is his name?

A Tony.

Q What is the name of the man that you identified as being the man whose picture has been marked Libelant's Exhibit No. 2?

A George.

Q The picture which you have in your hand now is a picture of a man named Tony, you say?

A Yes.

Q Do you know his last name?

A No, I don't know his last name.

MR. DOHERTY: I offer this picture in evidence, to be marked Libelant's Exhibit No. 3.

(Marked Libelant's Exhibit 3 and hereto attached.)

Q You said once that you first saw a speedboat come out to the "Przemysl" in July. Then you say

(Deposition of Eric Olaf Johnson)

you first saw one come out in August. When did you first see the "Rethalulew" come out to the "Przemysl"?

A The first of August, it came.

Q Who was on board when it came out the first of August?

A The same three guys—there were four men.

Q Name the three men that came out on the "Przemysl" the first of August.

A Tony, George, Johnny and Charley.

Q This picture which is marked Libelant's Exhibit No. 1 is a picture of whom? What is his name

A That is Johnny.

Q How many times did you see Johnny come out

A I seen him twenty or twenty-five times.

Q What did he come out on? What boat?

A The "Rethalulew."

Q During what months did you see him?

A I seen him the first time in July.

Q What did he come out on in July; what boat did he come out on in July?

A He came out on a small speedboat; I don't know the name.

Q The first time that you saw the "Rethalulew" you were at sea on the "Przemysl"; is that correct?

A Yes.

Q The "Rethalulew" came out alongside with Tony, John, George and another man on board?

A Yes.

Q That was during the month of August, 1928; is that correct?

A Yes.

(Deposition of Eric Olaf Johnson)

Q What did these men do when they came out to the "Przemysl"?

A They came out and talked to the skipper to get more cargo and bring it ashore.

Q They did what?

A They took some cargo.

Q Did they take cargo away from the "Przemysl"?

A Yes.

Q Where did they get the cargo?

A From the schooner.

Q What kind of a cargo did they take?

A They took cases of alcohol.

Q Was the alcohol placed on the speedboat?

A Yes.

Q On which speedboat?

A The first speedboat I don't know the name of.

Q I am referring to the time you said that Tony, Charley, John and George came out in the "Rethalulew" during the month of August. They came out in the "Rethalulew"; is that right?

A Yes.

Q You said cargo was transferred from the schooner to the speedboat?

A Yes.

Q When you say the speedboat, what speedboat do you mean?

A I don't remember the name of the first speedboat, I say.

Q I don't believe I understand you. See if I understand what you have said, so we will understand each

(Deposition of Eric Olaf Johnson)

other. If I understand what you have testified to previously in your testimony, you said that Tony, Charley, John and George came out on board the "Rethalulew" to the "Przemysl" sometime during the month of August; is that right.

A Yes.

Q They came out on the "Rethalulew"?

A Yes.

Q You also said that they took cargo from the "Przemysl"; is that right?

A Yes.

Q And the cargo was cases of alcohol; is that right?

A Yes.

Q Did they take those cases of alcohol in the "Rethalulew" or in some other speedboat at this time in August?

A No; in the "Rethalulew."

Q You mean that at that time in August they took a cargo on board the "Rethalulew"; is that what you mean?

A Yes.

Q And the cargo was alcohol?

A Yes.

Q How many times did you see Tony out there?

A I seen him only two times.

Q What did he come out on the next time?

A He came out on the same speedboat.

Q The "Rethalulew"?

A Yes.

Q When was the next time you saw him?

A It was the last of September.

(Deposition of Eric Olaf Johnson)

Q The last of September?

A Yes.

Q What did he do at that time?

A He came on board and he had to sell the cargo to the steamer. He sold 2000 cases.

Q What steamer do you mean? What was the name of the steamer?

A That was the "L'Aquila."

Q Did you ever see any Coast Guard cutters while you were out there?

A Yes. The same time we brought the cargo over to the steamer the Coast Guard came.

Q Did you transfer cargo from the "Przemysl" to the "L'Aquila"?

A Yes.

Q How did you make the transfer of cargo?

A The transfer was made on the speedboats.

Q What were the names of the speedboats that the cargo was transferred on?

A The "Rethalulew."

Q Who was on board the "Rethalulew" when the cargo was transferred?

A Tony and Johnny and Charley; the three of them.

Q Tony, Johnny and Charley?

A Yes.

Q How long did it take to transfer the 2000 cases?

A It took them one day; eight hours.

Q How man cases did the "Rethalulew" carry?

A How many cases?

Q Yes; how many cases of alcohol did she carry?

A Two or three hundred cases at a time.

(Deposition of Eric Olaf Johnson)

Q Going back to the time when you saw the Coast Guard cutter there, you say that was when the transfer of the cargo was being made to the "L'Aquila?"

A Yes.

Q What month of the year was that?

A The last of September.

Q 1928?

A 1928.

Q Describe what you saw. Tell us what you saw there when the Coast Guard cutter came out.

A When the Coast Guard came the speedboat was alongside the schooner, and the skipper told the speedboat that the Coast Guard was coming. So this speedboat has gone out, and the Coast Guard went after him, after the speedboat.

Q Who was on board the speedboat?

A These three guys that was on before; Johnny, Charley, and Tony.

Q The speedboat went away when the Coast Guard cutter came up?

A Yes.

Q What did the Coast Guard cutter do?

A It just went after the speedboat.

Q It went after the speedboat?

A Yes.

Q Did you hear any shots fired?

A Yes. I heard one shot one time from the Coast Guard.

Q Then what did the Coast Guard cutter finally do?

A The Coast Guard couldn't catch the speedboat.

(Deposition of Eric Olaf Johnson)

Q Did the Coast Guard cutter go back? Did it go away?

A Yes. The Coast Guard cutter came back again. It just went around the schooner. The Coast Guard cutter had never been alongside the schooner.

Q It came back near the schooner?

A It came back to the schooner. The Coast Guard had never been alongside the schooner.

Q You mean she wasn't tied up alongside?

A No.

Q After the Coast Guard cutter chased the speedboat what did the Coast Guard cutter do?

A It just went away.

Q In the direction it came from?

A Yes.

Q When did you see the speedboat again?

A The speedboat came back a couple of hours after.

Q Who was on board when she came back?

A The same guys.

Q Was any cargo discharged?

A Yes; it took two or three hundred cases. They came back before they went ashore.

Q Did it go back to the "L'Aquila" then?

A No; it went back to the shore.

Q You said you saw the "Rethalulew" out at the "Przemysl" a number of times. Did the "Rethalulew" take a cargo back with it each time it was out?

A Yes; it took a cargo back.

Q Did it go away with the cargo?

A Yes.

Q Did it get the cargo from the "Przemysl"?

(Deposition of Eric Olaf Johnson)

A Yes.

Q Was Johnny on board the "Rethalulew" every time you saw it?

A No; not every time.

Q Who else did you see on board?

A George and John and one guy more. I don't know his name.

Q How many times did George come out when Johnny wasn't on board?

A Six or seven times.

Q On the "Rethalulew"?

A Yes.

Q How many times did you see John out on the "Rethalulew"?

A I saw him twenty or twenty-five times.

Q Did the "Rethalulew" bring anything out to you; that is, out to the "Przemysl"?

A They brought some water and meat and bread.

Q They brought supplies?

A Yes, sir.

Q When you left Panama did you have a radio on board?

A No. They brought the radio outside, from the shore.

Q Did you have a radio on board when you left Panama?

A No.

Q Did you have one on board later?

A No; we never had a radio on board.

Q You never had a radio?

(Deposition of Eric Olaf Johnson)

A We got a radio from the shore; they brought it out from the shore.

Q A radio was brought out from shore?

A Yes.

Q Who brought it out?

A The speedboat.

Q Which speedboat brought it out?

A The "Rethalulew."

Q Who was on board the "Rethalulew" when the radio was brought out?

A That must have been George and Charley and one other guy; I don't know his name.

Q Did the "Rethalulew" take on cargo each time she came out? Did she take on cargo from the "Przemysl?"

A The same time?

Q Did the "Rethalulew" receive cargo from the "Przemysl" on every trip, every time she visited the "Przemysl"?

A Yes; every time.

Q What cargo did she take each time?

A She took alcohol and whisky.

Q Do you know how many cases she would take each time?

A 200 cases of alcohol.

Q In what month did you get the radio?

A I can't tell what month we got it; I don't remember.

Q How long after you left Panama was it before you went into port? How long after leaving Panama did you go into port?

(Deposition of Eric Olaf Johnson)

A About six months before we went to Port.

Q You were at sea for six months without being in any port?

A Yes.

Q What port did you go into?

A Ensenada, Mexico.

Q When did you go to Ensenada?

A The first of December.

Q 1928?

A 1928.

MR. DOHERTY: That will be all; you may cross-examine.

CROSS EXAMINATION

BY MR. KEARBY:

Q You signed on at Panama?

A Yes.

Q As a seaman or an officer?

A No; as seaman. I signed on as an oiler.

Q What were your duties as an oiler?

A I worked on the engines. I worked in the engine-room.

Q How do you know this was alcohol in these cases?

A Well, when we went from Panama they told me that they had some alcohol on board.

Q Who told you they had alcohol on board?

A The captain.

Q What was his name?

A Captain Schroder.

Q How did he happen to tell you he had alcohol?

(Deposition of Eric Olaf Johnson)

A In Panama I asked him what place the ship was going, where the cargo was going, and the captain told me she was going up to Vancouver.

Q What else?

A They never came to Vancouver.

Q What else did he tell you in Panama? Just go ahead and repeat that conversation.

A They told me the boat was going to Vancouver, and they told us we would just take the trip to Vancouver and then they would pay us off at Vancouver.

Q What else did he tell you? When you signed on he told you you were bound for Vancouver?

A Yes.

Q What else did he tell you?

A Nothing else.

Q You were just an ordinary laborer on that boat; just an oiler on the machinery?

A Yes, sir.

Q Did the captain tell you anything else at the time you signed on that boat besides the fact that you were bound for Vancouver?

A No.

Q He never told you another thing?

A No.

Q Did you talk with him after that?

A Yes; I talked with him after we left Panama.

Q After you left Panama?

A Yes.

Q When did you talk to him the first time?

A The day after I left Panama.

Q Where?

(Deposition of Eric Olaf Johnson)

A On board.

Q On what part of the vessel?

A. I can't tell what part of the vessel. I think it was aft.

Q Was it in the engineroom or in the cabin or on deck?

A On deck.

Q Did you go up and speak to him or did he come up and speak to you?

A No. I always came from the engineroom, and I talked to him on deck.

Q What did he tell you then?

A I asked him how long a time it would take from Panama to Vancouver. He said it would take about two months.

Q What else did he say?

A He said first before we got up to Vancouver we would transfer the cargo from the ship to the shore, and he said it might be one month.

Q He told you he would transfer the cargo from the boat before he reached Vancouver?

A Yes.

Q Did he tell you where he was going to transfer that cargo?

A No; he never told me what place.

Q What else did he tell you?

A No more than that.

Q When did you talk to him the next time?

A I talked to him every day.

Q Every day?

A Yes.

(Deposition of Eric Olaf Johnson)

Q What conversation did you have with him the next time?

A He talked about anything. I never talked to the skipper about the business.

Q You never talked to him about the business?

A No.

Q What else did he tell you?

A He told me a few things. He asked me about Sweden and I asked him about Germany, because he had been in Sweden quite a few times.

Q The balance of the conversation was general, was it?

A Yes.

Q He told you that he was bound for Vancouver?

A Yes.

Q Also that it would take him about two months to get there?

A Yes.

Q And that he was going to transfer his cargo before he got to Vancouver?

A Yes.

Q He didn't tell you, though, at what point he was going to transfer the cargo, did he?

A No.

Q Was that all he ever told you about his cargo or his destination or how long it was going to take to get there?

A He said he would not tell us how long it would take for the first stop.

Q Did you ever open any of those cases yourself?

A Do you mean if I opened them?

Q Yes.

(Deposition of Eric Olaf Johnson)

A No.

Q Did you see anybody else open any of them?

A No.

Q Did you ever drink any of that alcohol or the contents of those cases?

A No; I never drank any alcohol.

Q Then you don't know what was in there except from what you claim somebody told you?

A No.

Q You claim that was the skipper who told you that?

A Yes.

Q When did he tell you that?

A You mean the first time he told me?

Q Yes.

A He told me one day after we left Panama.

Q How long after you left Panama?

A One day after.

Q How did he come to tell you what his cargo was?

A One day after we left Panama he told me what cargo we had.

Q Why did he tell you what cargo he had? What was the occasion of his telling you what the cargo was?

A I can't remember.

Q You were just a hired man on there, on day labor. Why should the captain confide in you that he had a cargo of alcohol; that is what I want to know.

A He told me when we left Panama that he had some alcohol on board.

Q That he had some alcohol? Is that what he told you?

A Yes.

(Deposition of Eric Olaf Johnson)

Q Those were his words, "I have got some alcohol on board"?

A Yes.

Q That was the only thing he said about it?

A No; he didn't say any more than that. He said he had some alcohol and he was going to bring that stuff ashore at the Mexican coast.

Q When did you go in to the port of Ensenada?

A The first of December.

Q Not until the first of December?

A The first of December.

Q That was after you had unloaded the cargo?

A Yes; after that. We went empty into Ensenada.

Q You don't know where you were coasting when these two speedboats came to the vessel, to the schooner?

A No.

Q You don't know where you were?

A No.

Q You don't know whether you were off the coast of Mexico or off the coast of California, do you?

A I can't tell you.

Q You were out of sight of land?

A Yes.

Q What was the name of the first speedboat that came out there?

A I don't know the name of the first speedboat.

Q How many times did it come out?

A A couple of times.

Q What kind of a vessel was it?

A The speedboat?

Q Yes; describe it.

(Deposition of Eric Olaf Johnson)

A They were gray ones.
Q A green color?
A No; gray.
Q A solid gray?
A Yes.
Q With no trimmings?
A No; solid gray.
Q How long was it?
A 15 or 20 feet.
Q It made only two trips out there?
A Yes.
Q Who was on the first speedboat that came out?
A Four men.
Q Four men?
A Yes.
Q Who were they?
A Tony, Johnny, George and Charley.
Q Describe Tony.
A He was a short man with a black mustache.
Q How tall was he?
A About four feet tall.
Q Four feet tall?
A Yes.
Q About how much did he weigh?
A I don't know; I can't tell.
Q About how much?
A About 144 pounds.
Q He had a mustache?
A Yes; black mustache.
Q Was it a short one or long one?
A No; a short one.

(Deposition of Eric Olaf Johnson)

Q What color of eyes did he have?

A Black eyes.

Q What color of hair?

A Black hair.

Q Was he of dark complexion or light complexion?

A Light.

Q How was he dressed?

A In a blue suit and a hat.

Q I show you Libelant's Exhibit No. 3. Who do you say that is?

A Tony.

Q Does that man wear a mustache?

A Yes.

Q Does this picture have a mustache?

A No, this hasn't, but I know the face.

Q How many times do you say he came out to the schooner?

A Two times.

Q Two times only?

A Yes.

Q Once was about the first of July?

A The first of July was the first time.

Q That was when he came in the gray speedboat?

A Yes.

Q Then you didn't see him again until about the first of September?

A The last of September.

Q Did that speedboat carry any cargo away from there?

A Yes.

Q What did it take?

(Deposition of Eric Olaf Johnson)

A It took alcohol.

Q How many cases?

A About 200 cases.

Q Did you help load the cargo?

A Yes, I helped load the cargo.

Q Who else loaded it?

A Every man on board.

Q How many seamen were on the boat at that time?

A Five sailors, two men on the engines, the captain, the chief mate and second mate, and a cook and mess boy.

Q Each one of you helped take part of that cargo and put it on this speedboat?

A Yes.

Q Did these three men in the speedboat help also?

A Yes.

Q How long did it take?

A It took about one hour.

Q I will hand you Libelant's Exhibit No. 1. You say that was Charley?

A No; that is Johnny.

Q Describe Johnny.

A He is small. He is kind of a thick fellow, with red hair.

Q Was he as tall as Tony?

A He is about the same.

Q About four feet tall?

A Yes.

Q How much would he weigh?

A 150 pounds.

Q How old was he?

A 35 years old; he looked about 35 years old.

(Deposition of Eric Olaf Johnson)

Q Was he clean shaven or did he have a mustache?

A No; he had no mustache.

Q Did he have a beard?

A No.

Q What color of eyes did he have?

A Brown.

Q What color was his hair?

A Red.

Q How was he dressed?

A He was dressed in a blue shirt and working pants.

Q I will hand you now Libelant's Exhibit No. 2, which is a picture of a man whom you say was Charley, if I remember right. Is that Charley?

A No; that is George.

Q How tall was George?

A I can't tell how tall. He was the same length as Johnny.

Q That would be about 4 feet. What did he weigh?

A He weighed over 200 pounds, I think.

Q What was the color of his eyes?

A I can't tell you what color.

Q What color was his hair?

A Black. Not black; dark hair.

Q Was it straight or was it curly?

A Curly.

Q How was he dressed?

A He was dressed in a blue shirt and blue pants.

Q Just working clothes?

A Yes.

Q About how old was he?

(Deposition of Eric Olaf Johnson)

A About thirty years old.

Q Will you describe the "Rethalulew" for us?

A It is gray in color, about 28 feet long.

Q Was it 28 feet, or is that your guess?

A No; 28 feet long.

Q Exactly 28 feet?

A Not exactly, but about that.

Q Go ahead and describe it. Give us more of a description of it.

A It had three engines. It had four hatch covers, and what do you call the house over the engines?

Q The cabin?

A Yes.

Q How many cabins?

A One. It had a small boat on deck.

Q What kind of a boat was it?

A I don't know what kind of a boat.

Q Was it a rowboat or motorboat or what?

A No; a rowboat.

Q How long was it?

A 10 feet long.

Q How many seats were in it?

A There were two seats.

Q Can you give us any other description of this "Rethalulew"?

A. No, I can't give any other description.

Q Was it painted a solid gray?

A Yes.

Q It had no trimmings of any kind?

A No.

(Deposition of Eric Olaf Johnson)

Q How far out of the water did she sit? How high above the water did it sit?

A Three or four feet over the water.

Q At the highest point?

A Yes.

Q Did it have any sleeping cabins or berths?

A There were two berths alongside the cabin; and there were two tables and a stove.

Q Were they stationary bedsteads?

A The beds were inside the ship.

Q Was the name of the boat written on it?

A Yes, the "Rethalulew."

Q Was it painted on it?

A Yes, it was painted on it.

Q In the front or rear?

A Aft.

Q That means behind, doesn't it?

A Yes, behind.

Q How do you spell it?

A I can't spell it.

Q. Can you write it?

A I believe I can spell it. That is the way I get it. (Writes on paper.)

MR. KEARBY: I will introduce this paper in evidence as Respondent's Exhibit No. A.

(Marked Respondent's Exhibit A and hereto attached.)

Q Did you talk to any of these men, Tony, Charley, Johnny, or George?

A I never talked to Tony.

Q You never talked to Tony?

A No.

(Deposition of Eric Olaf Johnson)

Q Did you ever talk to Charley?

A Yes, I talked to Charley.

Q How many times?

A I talked to him every time he was out.

Q You just had a general conversation?

A No; just talking about everything.

Q But nothing about business?

A No, nothing about business.

Q Did you ever talk to Johnny?

A No, I never talked to him. I asked him a couple of times if he would buy some clothes for me.

Q You asked him that a couple of times?

A Yes.

Q Did you have any other conversation with him?

A No.

Q Did you ever talk to George?

A No, I never talked to George.

Q You don't know what the last name of any of them is, do you?

A No.

Q You don't remember the name of this first speedboat that came out?

A No; I don't remember the name of the first one.

Q Can you give us any further description except that it was gray and about 30 feet long?

A No.

Q You can't give any other description of it?

A No.

Q When did you first see the "L'Aquila"?

A We seen it the first time we stopped outside.

Q When was that?

(Deposition of Eric Olaf Johnson)

A The first of July.

Q Where did it come from?

A I don't know. I think it came from Antwerp, Belgium.

Q Did you see the flag?

A Yes.

Q What kind of flag was it carrying?

A The English flag.

Q How close did it come to you?

A Four or five hundred yards.

Q Did it anchor?

A No.

Q How long did it stay out there?

A I can't tell you how long it stayed out there. The ship had been outside a couple of months before we came.

Q You mean the "L'Aquila" had been there two months before you came up?

A Yes.

Q How do you know that?

A Somebody told me.

Q When you got up there the "L'Aquila" was still there?

A Yes.

Q You came up within how many yards of it?

A Four or five hundred yards.

Q Neither boat was anchored at any time?

A No; it had never been anchored.

Q Was the name of the "L'Aquila" written on the side of the vessel?

A The "Rethalulew"?

(Deposition of Eric Olaf Johnson)

Q No. I am talking about the "L'Aquila," the Belgian boat or the English boat that was there when you got there.

A Yes.

Q The name was written on the vessel?

A Yes.

Q On the front or the rear? Was it on the front of the boat or behind the boat?

A On the front part of the boat.

Q Was it on one side or both sides?

A I never seen it only on one side.

Q Which side did you see it on?

A I saw it on the starboard side.

Q As you face the front of a boat, would that be on the right or left? If you are standing facing the front of a vessel, would the starboard side be on the right or left side?

A The starboard side must be on the right side.

Q Will you write down the name of the "L'Aquila" there? Can you spell that out for us?

A I don't know that I can spell it. (Writes) That is the way I got it.

MR. KEARBY: I will offer this as Respondent's Exhibit B.

(Marked Respondent's Exhibit B and hereto attached.)

Q How long did the "L'Aquila" stay out there?

A I don't know.

Q About how long?

A I can't tell now.

Q Was it one day, two days, or a week? How long did the "L'Aquila" and the "Przemysl" stay out there

(Deposition of Eric Olaf Johnson)

together after you came up and stopped beside the "L'Aquila" within four or five hundred yards of it?

A They were together five or six months.

Q You got there about when? What time did you get up to where the "L'Aquila" was; what month?

A The first of July.

Q You got into Ensenada the first of December?

A Yes.

Q Then the "L'Aquila" stayed out there close to the "Przemysl" from the first of July until you left and went down to Ensenada? Is that correct?

A Yes.

Q Was all of the cargo of the "Przemysl" unloaded before you went to Ensenada?

A Yes.

Q There wasn't any of it left?

A Yes.

Q You said there were 25,000 or 30,000 cases that you had originally; is that correct?

A Yes.

Q And all of it you say was taken away by the "Rethalulew"?

A Yes.

Q And the "Rethalulew" would carry about 200 cases at a time?

A Two or three or four hundred cases.

Q You say the "Rethalulew" made about 20 or 25 trips?

A About 25 or 30 trips.

Q Didn't you state a while ago it made from 20 to 25 trips?

(Deposition of Eric Olaf Johnson)

A 20, 25 or 30 trips.

Q 20, 25 or 30 trips is now your answer?

A Yes, sir.

Q Did it come every day?

A Not every day. Sometimes once and sometimes twice a week.

Q Sometimes once and sometimes twice a week?

A And sometimes three times.

Q Do you remember how many weeks it went out there three times a week?

A No, I don't remember.

Q Did it make more than three visits in one week; did it come out there more than three times any week? Do you remember any week that it came out more than three times? Do you understand?

A Yes; but some weeks it came three times and some weeks it came only once.

Q Some weeks it came three times and some weeks only one time; is that correct?

A Yes.

Q At no time did it come more than three times a week?

A No.

Q You don't know how many times it came three times a week?

A No.

Q Did it come more than three or four times three times a week?

A No; I can't say how many times it came three times a week.

MR. KEARBY: I believe that is all.

(Deposition of Walter Kruger)

MR. DOHERTY: That is all.

(Whereupon, by agreement of counsel, an adjournment was had in the taking of depositions until the hour of two o'clock p. m., at the same place, and at said time and place, all parties being present, the taking of depositions was resumed as follows, to wit:)

WALTER KRUGER,

called as a witness on behalf of the Libelant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOHERTY:

Q What is your name?

A Walter Kruger.

Q Of what country are you a citizen?

A Germany.

Q Were you a member of the crew of the "Przemysl"?

A Yes.

Q Where did you sign on?

A At Hamburg, Germany.

Q What cargo did the "Przemysl" have?

A Alcohol and whisky.

Q How much alcohol?

A About 10,000 cases of alcohol.

Q How much whisky?

A About 400 barrels.

Q What was the destination of the "Przemysl" when she left Hamburg?

A Vancouver, B. C.

Q From Hamburg where did she go?

A To Colon.

(Deposition of Walter Kruger)

Q From Colon to where?

A New Orleans.

Q From New Orleans where did she go?

A Back to Colon, and through the Panama Canal, and then up the Pacific Coast. It remained on the Pacific Coast.

Q How long did it remain on the Pacific Coast?

A Until November.

Q When did she leave Hamburg?

A In August, 1927.

Q When did she go through the Canal on the way up the Pacific Coast? When did she depart from the Canal Zone?

A In June, 1928.

Q That is, on the voyage on Pacific waters?

A Yes.

Q What cargo did you have on board when you came up the Pacific Coast?

A The same cargo we had when we left Hamburg.

Q Where did you go from Panama?

A To Balboa.

Q That was the port at the Pacific side of the Panama Canal; that was where you left from when you came in Pacific waters, was it not?

A Yes.

Q From Balboa where did you go?

A We remained on the Pacific Coast until about November. Then we went into Ensenada.

Q Where did you stop; where was the first place you stopped on the Pacific Coast?

(Deposition of Walter Kruger)

A About 40 miles off of San Diego. That is the first place we stopped.

Q Did you say you left the Canal Zone in June?

A Yes.

Q When did you take up the position about 40 miles off San Diego?

A About a month later.

Q How long did you stay in that position?

A About a month.

Q Then you moved to another position?

A We moved up to another position and stayed there about the same time, about another month.

Q Did you move to another position?

A Yes; around Santa Barbara.

Q That would be during July, August and September; is that correct?

A Yes.

Q You said it took you about a month to get up north from the Canal Zone?

A Yes.

Q You were at position No. 1 for one month, position No. 2 for one month, and at position No. 3 about one month?

A About that long.

Q From the last position where did you go?

A We started to go farther north and then went back south.

Q What port did you put into?

A Ensenada, Mexico.

Q When did you arrive in Ensenada?

(Deposition of Walter Kruger)

A On the 22nd of November.

Q 1928?

A Yes.

Q That was the first port you put into after you left Balboa?

A Yes.

Q What cargo did you have on board when you arrived at Ensenada?

A Nothing.

Q You were empty?

A Yes.

Q What became of the cargo?

A We discharged the cargo.

Q At sea?

A At sea, yes.

Q In these three positions you referred to?

A Yes.

Q Did you discharge cargo in the three positions?

A In each one of them.

Q How did you discharge the cargo?

A The speedboats came out and took the cargo.

Q Do you know the names of any of the speedboats?

A. Yes. One was the "Rethalulew" and one was the A-1817.

Q Can you think of another one?

A There was another one which was called the "Seal", but it didn't come over to us.

Q Who did you see on board the "Rethalulew"?

A I seen lots of fellows there. The Captain of the "Rethalulew" was a fellow by the name of Red McCluskey.

(Deposition of Walter Kruger)

Q I will show you a picture and ask you if you recognize that man.

MR. KEARBY: I am going to ask that the witness describe it first; and I object to showing the picture to him first. That is the same objection I made this morning.

Q BY MR. DOHERTY: I will show you Libelant's Exhibit No. 1 and ask you if you have seen that man before.

A Yes; that is the skipper of the "Rethalulew."

Q What is his name?

A Red McCluskey, we called him.

Q When did you first see the "Rethalulew"?

A In August of last year.

Q In August of last year?

A Yes.

Q How many times did you see it at sea?

A Lots of times; fifteen or sixteen times.

Q Would it come to the "Przemysl" and then depart, or go back?

A Yes.

Q How many times did it take cargo off at sea?

A How many times did the "Rethalulew" take cargo?

Q Did it take cargo each trip or did it go back empty each time?

A No; every time they came they took cargo back.

Q That would be about fifteen times you would say?

A Yes; that is just rough.

Q A rough guess?

A Yes.

Q How many cases would it take each trip?

(Deposition of Walter Kruger)

A It was different. Sometimes they took three or four or five hundred.

Q You have seen it take five hundred?

A That is all she could take anyway.

Q BY MR. KEARBY: What do you mean? I didn't understand.

MR. DOHERTY: He said that was all she could take.

Q You mean that was her capacity?

A Yes.

Q How did you get your supplies when you were on board the "Przemysl"?

A The boats brought it out.

Q Which boats?

A The A-1817 and the "Rethalulew."

Q How many times did the "Rethalulew" bring supplies to you?

A Almost every time she came.

Q Did the "Rethalulew" visit the "Przemysl" at the first position off San Diego?

A No; I think it was in the second position.

Q When did she first visit the "Przemysl"

A It was about the first week in the month of July or August.

Q August?

A Yes.

Q How often would you see her generally?

A She would come different times. Sometimes she came two and three times a week, and sometimes she wouldn't come for two weeks.

Q That was during the month of August?

(Deposition of Walter Kruger)

A Yes.

Q Did you see it during the month of September?

A Yes.

Q Did the "Przemysl" have a radio on board when it left Hamburg?

A No.

Q Did it ever have one on board while you were a member of the crew?

A Yes. We had one that the "Rethalulew" brought out. It brought a receiving set and a sending set.

Q Were messages sent back and forth to the shore?

A Yes.

Q The radio set was used?

A Yes.

Q It had a radio operator on board?

A Yes.

Q Do you know a man named Strallo?

A Yes.

Q Where did you first meet him?

A In Hamburg.

Q How many times did you see him in Hamburg?

A I seen him twice very close. I was talking with him twice in Hamburg. Then I have seen him at quite a distance, too.

Q Where did you get your cargo?

A Where did we get the cargo?

Q Yes; the original cargo you had on the ship.

A We loaded the boat at Hamburg.

Q At what dock were you in Hamburg? At what pier were you when you received the cargo?

(Deposition of Walter Kruger)

A The factory where we got the alcohol had a pier there. The boat was docked at the pier.

Q You were tied up at the factory's pier?

A Yes.

Q What kind of factory was it?

A It was a spirit factory.

Q Where spirits were manufactured?

A Yes.

Q That is where you received the alcohol?

A Yes.

Q Did you see Strallo around there then?

A Yes.

Q What was he doing?

A He was kind of managing the cargo there, giving orders.

Q As to the stowage of the cargo?

A Yes; how to stow and acting like a supercargo.

MR. KEARBY: Just tell what he did. I have no objection to anything he did, but I object to what he was acting like.

Q BY MR. DOHERTY: Go ahead.

A He gave orders about the cargo, how to stow the cargo, in which part of the boat; and I seen him in the spirit factory there, where he was looking the cargo over.

Q Was he on board the day you sailed?

A Yes, he was.

Q What was he doing that day?

A He went along with the boat on the river, and left the boat with the customs officers.

Q While the "Przemysl" was under way he was on board?

(Deposition of Walter Kruger)

A Yes.

Q Then he came from the spirits factory to the customs house along with the "Przemysl"?

A He came on board.

Q Where?

A Where we left the pier at the alcohol factory.

Q From there where did the vessel go; to the customs house?

A No; she went down the Elba River.

Q He was on board when the boat left the factory?

A Yes.

Q The boat went where from the factory?

A To sea. First it has to go down the river to get to the sea.

Q How long did it take you to get from the factory to the customs house?

A About an hour. You mean the customs station?

Q Yes.

A Yes.

Q Did you stop at the customs station?

A Yes.

Q You got your clearance papers there?

A Yes.

Q Did Strallo get off the boat there?

A Yes, he did.

Q He got off the "Przemysl" there?

A Yes.

Q When did you next see him; that is, after you left Germany when did you next see him?

A On the Pacific Coast at our first position.

Q Who was with him when you saw him?

(Deposition of Walter Kruger)

A Red McCluskey. No, it wasn't Red; it was another fellow. George—I have forgotten his name.

Q A fellow named George?

A Yes.

Q How did they come to the "Przemysl"?

A They came in a boat, the A-1817.

Q Did they come on board the "Przemysl"?

A Yes.

Q Did you see Strallo on board?

A Yes.

Q Do you know him under any other name?

A Under another name—Cornero, in New Orleans. I learned his name was Tony Cornero in New Orleans.

Q Did he look the same to you when you saw him on the Pacific Ocean as he did in Hamburg?

A Well, he had a mustache the other time.

Q When did he have the mustache?

A He didn't have a mustache in Hamburg.

Q He did when you saw him on the Pacific Coast?

A Yes.

Q You saw him at your first position?

A Yes.

Q You were at your first position in July?

A Yes.

Q How many speedboats had you seen prior to the time you saw Cornero? How many speedboats had you *see* at this first position before you saw Cornero?

A Just one.

Q When did that speedboat come?

A That was the A-1817. She came the day when we arrived at the first position. She came alongside.

(Deposition of Walter Kruger)

Q How many days after that did you see Cornero?

A About a day or two. Maybe a couple of days later.

Q He came out on the A-1817?

A Yes.

Q When he came out on that boat the second time, when he came there, was that the second time you saw the A-1817?

A Yes.

Q Did you ever see any speedboats before that, before the two times you named when you saw the A-1817?

A Yes.

Q That was the first visit you had?

A Yes.

Q When did you see Cornero again?

A Then he came from the other steamer, the "L'Aquila."

Q To the "Przemysl"?

A Yes.

Q How far away from you was the "L'Aquila"?

A We were hove to and the "L'Aquila" was hove to, the same as we were.

Q About how far away were the two ships from each other?

A Just a few hundred feet.

Q And Cornero came from the L'Aquila?

A Yes.

Q To the "Przemysl"?

A Yes.

Q How did he come?

(Deposition of Walter Kruger)

A He come over with a boat from the "L'Aquila," a little boat.

Q Did you see the "Rethalulew" there then?

A No, she was not there then.

Q She wasn't there that day?

A No.

Q Did you ever see Cornero out there when the "Rethalulew" was there?

A Yes. I think it was the next day after Cornero came from the "L'Aquila." The Rethalulew" came out and Strallo stayed on the "Przemysl."

Q Did he stay on there all night?

A Yes.

Q The next day did the "Rethalulew" come out?

A Yes.

Q Who was on board the "Rethalulew" then? Was McCluskey on there?

A He came with Strallo from the "L'Aquila," too, and McCluskey went back to the "L'Aquila."

Q Who was the skipper of the "Rethalulew" the next day when she came out?

A The next day I saw McCluskey on the "Rethalulew."

Q He was on the "REthalulew"?

A Yes.

Q He didn't stay on board the "Przemysl" the first day?

A No; he just came over with Cornero to the "Przemysl" and went back to the "L'Aquila."

Q And Strallo stayed on board all night? He stayed on board the "Przemysl" all night?

(Deposition of Walter Kruger)

A No, not that night. I guess Strallo went back to the "L'Aquila." You see, both boats were hove to and there was kind of traffic between the boats all the time; so I guess it was the next day he came over and stayed all night, and about a day, on the "Przemysl."

Q The next day was the day that McClusky and Tony Cornero came on board the "Przemysl" from the "L'Aquila," the day after you saw the "Rethalulew"?

A I am not quite sure whether it was one day. Maybe it was two days after that.

Q You say McCluskey was the skipper at that time?

A Yes.

Q Did anything unusual occur on that trip?

A We transferred our cargo over to the "L'Aquila."

Q How much did you transfer, do you know?

A About 2000 cases.

Q 2000 cases of alcohol?

A Yes.

Q Did anything else unusual occur? Did you see anything at sea, any ships?

A Yes; the Coast Guard cutter came out.

Q Where did the Coast Guard cutter come from?

A I don't know. I guess it came from shore.

Q You were out of sight of land?

A Yes.

Q You first sighted the Coast Guard cutter on the horizon?

A Yes.

Q Where was the "Rethalulew" when you first sighted the cutter?

(Deposition of Walter Kruger)

A Alongside the "Przemysl."

Q Tied up?

A Tied up.

Q What happened then?

A The "Rethalulew" left us and the cutter chased the "Rethalulew."

Q When was that; what date?

A It was the end of September, around the 26th or 27th. I am not quite sure. Anyway, it was September.

Q What all did you have in the cargo? Did you have anything in the cargo besides the spirits when you left Hamburg?

A Yes.

Q What did you have?

A Gin essence, and a still, and two cases of machinery.

Q Were they large cases of machinery?

A Yes.

Q About how large? How heavy?

A I think they were about 100 pounds each. I didn't lift them. They just lifted them with a winch.

Q They were hoisted out of the hold with a winch?

A Yes.

Q And were swung over the side of the ship with a boom?

A No; just on deck, and the sailors moved them.

Q What became of the two boxes of machinery? What did you do with those?

A The "Rethalulew" took them aboard.

(Deposition of Walter Kruger)

Q Was McCluskey on board then?

A Yes.

Q What became of the still?

A They took that too on the "Rethalulew."

Q Was McCluskey on board that time?

A Yes.

Q How did you get your supplies when you were out at sea on the "Przemsyl"?

A The A-1817 and the "Rethalulew" brought groceries out and cigarettes and clothing and water.

Q From the third position you stated you went to Ensenada, Mexico; is that correct?

A Yes. Before that she went north and turned back and then went to Ensenada.

Q Did you see Cornero in Ensenada?

A Yes.

Q Did you see McCluskey there?

A Yes, I seen McCluskey. He didn't come on board. I seen him in town in Ensenada.

Q You saw him ashore?

A Yes.

Q With whom was he?

A I don't know that fellow he was with.

Q You don't know whom he was with?

A No.

Q Did you see Strallo in Ensenada at the same time?

A He came about a couple of days after we reached Ensenada. He came on board.

Q What did he say?

A Well, he just talked, you know, like fellows talk.

(Deposition of Walter Kruger)

Q He was just passing the time of day?

A Yes.

Q Did he say anything else?

A He gave orders to go up to San Pedro after we left Ensenada.

Q What did he say when he gave the orders?

A He said to go up to Ensenada, and if somebody came and asked us about the speedboats and him, to tell them we don't know anything about it.

Q I will have you identify these pictures.

MR. KEARBY: I will make the same objection. I think he ought to describe the people first.

Q BY MR. DOHERTY: I will show you Libelant's Exhibit 3 and ask if you have seen that man before.

A That is Strallo. That is the way I knew him in Hamburg.

Q I show you Libelant's Exhibit No. 2 and ask you if you have seen that man before.

A Yes. This fellow came out on the A-1817.

Q What is his name?

A George. I forget his last name. His first name is George.

Q You say at the time the "Rethalulew" was chased by the cutter, when you were out at sea, that Tony Cornero and Red McCluskey were there?

A Yes.

Q What did they do when the cutter came up?

A Cornero jumped on the speedboat and left with the speedboat.

Q Did McCluskey go out in the speedboat too?

A Yes.

(Deposition of Walter Kruger)

Q Where did they go?

A They went out of sight. About an hour later they came back.

Q What happened when they came back? How long did they stay there at the "Przemysl"?

A They took some more cases. They didn't stay long. They started to give orders to change position.

Q The position of what?

A To change our position at sea; to go farther up north.

Q For the "Przemysl" to change her position?

A Yes.

Q Did you change your position?

A Yes; we went up north.

Q When did you leave and start north? How long was that after the orders were given?

A Right away.

Q The same day?

A Right away the same day after we got the orders.

MR. DOHERTY: That is all.

CROSS-EXAMINATION

BY MR. KEARBY:

Q You signed on this boat at Hamburg, did you?

A Yes.

Q Are you an officer?

A Well, I became an officer in charge after we ran on the Pacific.

Q You didn't sign on as an officer?

A I didn't sign on as an officer, no.

Q You signed on as a seaman?

(Deposition of Walter Kruger)

A Yes; at Hamburg. I signed on as boatswain in New Orleans.

Q As boatswain in New Orleans?

A Yes.

Q Were you an officer on that vessel or did you act as officer before you got to New Orleans?

A No.

Q Do you hold any kind of commission as an officer under the German license?

A You mean a kind of certificate like a mate's certificate.

Q Yes.

A No; I haven't anything.

Q Who employed you on that boat?

A Captain Thode.

Q How do you spell his name?

A T-h-o-d-e.

Q You say this factory manufactured spirits?

A Yes.

Q What else did it manufacture?

A It just made booze; liquor and alcohol.

Q Nothing else?

A No.

Q Were you ever in that factory before?

A Working?

Q Yes.

A No; I didn't work in that factory before.

Q That was the only time you were at that factory, that is, while they were loading this boat?

A Yes.

Q What was the name of the factory?

(Deposition of Walter Kruger)

A Peterson.

Q What kind of spirits did they manufacture at the factory?

A I didn't understand the question.

Q You said the factory manufactured nothing but spirits.

A Yes.

Q What kind of spirits did they manufacture?

A Alcohol; liquor.

Q What do you mean by liquor?

A Rum, cognac and alcohol.

Q What else?

A I don't know. They manufactured all kinds of assorted liquor.

Q Where did you get your information from as to what they manufactured?

A I know.

Q You what?

A I know that. The factory gave twelve cases of liquor to the boat.

Q Where did you get your information that they manufactured nothing but liquor? How do you know they didn't manufacture perfumes?

A Because I went into the factory and I seen the fellows that was working there, and seen them filling bottles, and I tasted the stuff myself and knew it was alcohol.

Q Did you see them manufacturing cognac?

A I know they sold cognac there.

Q You know they had it there, but do you know whether they made it there or not?

(Deposition of Walter Kruger)

A I don't know.

Q You don't know anything about that?

A No.

Q When you answered that they manufactured nothing but spirits you don't know whether they manufactured anything but spirits or not, do you?

A What do you mean by manufacturing?

Q I mean what they made there. How do you know they manufactured nothing but spirits? That is what I am trying to get at.

A That is what I seen there. I didn't see anything else but spirits in there.

Q What was your destination when you left Hamburg? What was it to be?

A Vancouver, B. C.

Q How did you happen to go to New Orleans?

A Captain Thode gave orders to go up to New Orleans.

Q For what purpose?

A They didn't tell us for what purpose.

Q Was that boat unloaded at New Orleans?

A Yes.

Q You don't know for what reason, do you?

A The Government seized the boat; the Government unloaded the boat.

Q Were you a party to any conspiracy between either the captain of that vessel or anybody else on board the boat and any government officials or anybody else, to divert the course of that vessel to New Orleans and have it seized at New Orleans, under an agreement that the

(Deposition of Walter Kruger)

crew was to have half of the cargo and the other conspirators the other half?

A I don't know anything about that.

Q How long did you stay at New Orleans?

A About six months.

Q Do you know anything about the litigation over that vessel in New Orleans?

A About what?

Q About the lawsuit about the boat in New Orleans.

A About our boat?

Q Yes, about the boat and the cargo, or either one.

A All I know is the boat was seized and released by the Government again.

Q Were you a witness in that case? Did you testify in that case?

A No.

Q You did not?

A No.

Q Are you under arrest now?

A I am in custody up at the Immigration Station.

Q Have any proceedings to deport you been filed by the Government?

A I don't know about my immigration case. I don't know about that. It hasn't been settled yet.

Q But proceedings have been filed by the Government to deport you?

A I don't know.

Q Have you made a trade with any Government official or an agreement that you are to receive any kind of a concession because of your testimony in this case?

A No.

(Deposition of Walter Kruger)

Q You haven't?

A No.

Q Whom have you talked with about your testimony in this case?

A You mean who I talked with about this case?

Q Yes.

A Only Mr. Dresser came to me and—

Q And what?

A Nothing. He was just talking, and he asked me if I was a member of the crew, and I said yes, and I made this testimony willingly.

Q I understand you are. Were you told to make that statement, that you were giving this testimony willingly?

A No, we weren't told to do that, no.

Q Where did the Government find you?

A I beg your pardon?

Q Where did the Government find you?

A Find me?

Q Yes.

A The Canadian immigration officers sent me back to the station.

Q When did you first talk to Mr. Dresser?

A I beg pardon?

Q You were sent back to the States under the custody of an officer?

A Yes.

Q Who was it?

A The Canadian immigration officers deported me back to Seattle.

Q When you got back to Seattle what became of you?

A I got deported down to Los Angeles.

(Deposition of Walter Kruger)

Q Whom did you talk to in Seattle?

A I didn't talk to anybody there.

Q You didn't talk about your testimony in this case?

A No; not about this case.

Q When you got to Los Angeles who was the first man you talked to about your testimony in this case?

A I called for Mr. Dresser.

Q You called for him?

A Yes.

Q Where did you know him before?

A I knew him from New Orleans.

Q How did you know he was in Los Angeles?

A I knew he was living there.

Q You say you came through the Canal Zone about the first of July and then came into the Pacific Ocean; is that correct?

A No.

Q About when was it?

A We left the Canal Zone in June.

Q You mean you entered the Pacific Ocean in June?

A Yes.

Q And came north up the Pacific Coast?

A Yes.

Q Your first position was just off of San Diego?

A Yes, sir.

Q That was where you stopped the first time?

A That is where we hove to.

Q When did you get there?

A In July.

Q About what time?

(Deposition of Walter Kruger)

A I can't remember exactly.

Q Was it the early part of July or the middle?

A I can't recall that.

Q You don't remember?

A No.

Q Did you anchor there or did you just ride the waves?

A Well, we just were hove to. They stopped the boat; they didn't anchor.

Q How long did you stay there?

A About a month.

Q While you were there this boat, the A-1817, came out?

A Yes.

Q Whom did you see on it?

A A fellow by the name of George. I forget his last name. His first name was George.

Q Describe George.

A He is a short and kind of fat fellow.

Q What do you mean by short?

A Stout.

Q What was his height?

A Five feet six; about that.

Q He was of stout build?

A Yes.

Q How old was he?

A He is about thirty years old. That is what he looked like.

Q What color of eyes did he have?

A Brown, I guess.

Q His hair was what color?

(Deposition of Walter Kruger)

A His hair was dark and a little curly.

Q Was it as dark as yours?

A Yes; about that.

Q Almost black; is that correct?

A I don't know if he is darker than me or whether I am darker. I know he has got a dark complexion.

Q Was he an American or a foreigner?

A I don't know; but maybe he is an American.

Q He looked like an American?

A He didn't look like an American. He looked more like a Wop.

Q You don't know his last name?

A I knew it, but I forgot it.

Q How many times did you see him?

A I seen him lots of times.

Q Who else was on that boat?

A On the A-1817?

Q Yes.

A Another fellow. I have forgotten his name. I don't know it.

Q Describe him.

A I cannot recall him, anyway.

Q You can't describe him?

A No, I couldn't recall him.

Q You don't know whether he was tall or short?

A I know that he was kind of tall.

Q You don't know whether he was light or dark complected?

A I don't know.

Q You don't know whether he was of heavy build or light build?

(Deposition of Walter Kruger)

A I don't know that.

Q Who else was on the boat, on the A-1817?

A Just the two of them.

Q What did the boat do when it came out there?

A It brought out supplies.

Q This man McCluskey was not on the boat then?

A He came out with the "Rethalulew."

Q I am talking about the first trip.

A He came out in a small boat, but I don't know if it was the A-1817 or not.

Q You have described two men. You said the A-1817 first came out when you got to this position off of San Diego, and you said there were two men on that boat. Were there only two men on the boat?

A Yes.

Q McCluskey was not on the A-1817 at that time, was he?

A No, he was not with this George. They never came together.

Q He never came there at any time with George; is that what I understand?

A I don't think so.

Q Did he ever come there with this other man at any time?

A I cannot recall that other man.

Q Did McCluskey come there while the A-1817 was there at the boat on this first visit? Did he come there in any other boat while the A-1817 was there?

A That was the first boat that came out.

Q On the first trip?

A Yes.

(Deposition of Walter Kruger)

Q McCluskey was not there then?

A No.

Q Did he come out in any boat while the A-1817 was there?

A One day there was two boats there.

Q I am talking about the first visit. Let us try to take them one at a time.

A All right.

Q Did McCluskey come out on any other boat while the A-1817 was at your boat, the schooner?

A Do you mean to say that those two were together: the two boats were together there?

Q Yes. Did anybody else come on any other boat while the A-1817 was at your boat?

A Yes; one time there was two boats, and one was the "Rethalulew" and one was the A-1817.

Q Was that the first visit?

A No.

Q I am asking you about the first visit.

A There wasn't on the first visit.

Q Nobody else came there?

A No.

Q This man yau call Cornero was not on the A-1817 on this first visit, was he?

A No.

Q Describe this man Strallo, as you call him.

A He looks like a—

Q Just describe him. How tall was he?

A Five feet six; five feet five and a half or six.

Q Was he of heavy build or light build?

A He was about middle size.

(Deposition of Walter Kruger)

Q How much would he weigh?

A About 160 or 165.

Q What age was he?

A He looked like he was close to forty.

Q What was the color of his eyes?

A Brown.

Q And his hair?

A He had dark hair.

Q Do you mean by that brown or black or a kind of dark brown?

A Black or brown.

Q Was it straight or curly?

A No, it wasn't curly.

Q It was not curly?

A No.

Q Was it close cropped or was it long?

A It was long.

Q How was he dressed?

A He was dressed pretty good.

Q Describe his dress. What color of clothes did he have?

A He had a brown suit.

Q What color of shirt?

A I seen him lots of times in all kinds of clothes.

Q I am talking about the first time you saw him. He had on a brown suit. What kind of shirt did he have on?

A I don't know what kind of shirt.

Q What color of shoes did he have on?

A I don't know what color.

Q Did he have on a hat or cap?

A A hat.

(Deposition of Walter Kruger)

Q What was the color of the hat?

A That was brown, I guess.

Q Do you recall the color of his necktie?

A No, I don't.

Q You say he wore a mustache?

A That is when I seen him back here.

Q In Hamburg he didn't have a mustache?

A No.

Q When did you say you sailed from Hamburg?

A The 28th of August, 1927.

Q New Orleans was the first port you put into?

A No; at Colon.

Q When did you put into Colon?

A The 12th or 13th of September of the same year.

Q From Colon you went to New Orleans?

A Yes.

Q When did you put in at New Orleans?

A I guess it was at the end of October.

Q You took on 10,000 cases of alcohol; is that correct?

A Yes.

Q Also some other spirits?

A Yes.

Q Some essence of gin?

A Yes.

Q How much essence of gin?

A There were two cases of gin essence; two boxes.

Q What size of cases were those?

A About this size (indicating).

Q About four feet long?

A Yes; about 4 feet square.

(Deposition of Walter Kruger)

Q It would form a cube? Do you know what I mean?

A Yes.

Q That would be 4 feet across and 4 feet deep?

A Yes.

Q There were two cases of gin essence?

A Yes.

Q There were 10,000 cases of alcohol?

A Yes.

Q What else?

A About 400 kegs of whisky.

Q What kind of whisky?

A I don't know what kind of whisky it was.

Q You don't know whether it was Scotch, Bourbon or Rye?

A No.

Q You had no other spirits or liquors?

A There were five barrels of what they called Pasteure. They call it Pasteure.

Q Can you spell it?

A I thnnk it is P-a-s-t-e-u-r-e. It is a kind of sherry wine.

Q Did you have any other spirits or liquors?

A No.

Q There was a still?

A Yes.

Q What was the size of it; what was its capacity? Stills are usually measured in gallons. Do you know what the capacity was?

A No.

Q Was it a large one or a small one?

A A small one.

(Deposition of Walter Kruger)

Q Was there anything peculiar about the still?

A No.

Q What was this machinery that was on board?

A I didn't see the machinery. They were just cases and boxes. There was no name on the machinery.

Q How many boxes were there?

A Two boxes.

Q About what size were these boxes?

A About the same size as the gin essence.

Q About 4-foot cubes?

A Yes.

Q There were two of those cubes?

A Yes.

Q How much did they weigh?

A About 100 pounds each.

Q Was there anything else, any other cargo, besides what you have named?

A No; I don't think there was any other cargo.

Q Do you know this man, Eric Olaf Johnson?

A Yes.

Q Where did you first know him?

A He was a member of the crew we signed on in Balboa, Canal Zone.

Q Did you sign him on?

A I didn't; the captain did.

Q Have you talked with him lately?

A The last time I talked to him was in Ensenada.

Q When was that?

A In November of last year.

Q That was the last time you saw him to talk to him?

A Yes.

(Deposition of Walter Kruger)

Q You say you saw Strallo again in New Orleans?

A No, I didn't see him there.

Q Didn't you see him there?

A No, I didn't say that.

Q Did I misunderstand you? I thought you said you first saw Strallo in Hamburg while you were around there loading the vessel.

A Yes.

Q Then you saw him in New Orleans and his name was Cornero?

A I said I learned his name was Tony Cornero in New Orleans.

Q Somebody told you that?

A Yes.

MR. KEARBY: We will, of course, move to exclude that at the proper time.

Q You didn't see this man Strallo in New Orleans at all?

A No, I didn't see him there.

Q The next time you saw Strallo was while you were in your first position, when you had stopped off the coast opposite San Diego?

A Yes.

Q When was the first time you saw him there; about what month?

A July.

Q How soon after you had stopped your engines did he come out?

A He came out about a couple of days after we reached the position.

Q How did he come?

(Deposition of Walter Kruger)

A He came over on the A-1817.

Q Who was with him?

A That fellow George.

Q George?

A Yes.

Q Was there anybody else?

A Yes; there was another man with him.

Q Who was he?

A I don't know him.

Q Had you ever seen that man before?

A No.

Q Have you ever seen him since?

A I might; I don't remember.

Q Can you describe him to us?

A No.

Q Was he tall or was he short?

A I can't describe him.

Q Was he light or dark complected?

A I can't tell.

Q Was he a heavy or a light man?

A I can't tell.

Q On this occasion Strallo had on a mustache? He was wearing a mustache?

A Yes.

Q Did you talk to him?

A Yes; just said "Hello." I supposed he recognized me from Hamburg.

Q You had no other conversation with him than that?

A No.

Q By the way, how many members of your crew were there?

(Deposition of Walter Kruger)

A There were 13 in the crew from Hamburg to New Orleans.

Q Did you ship on any men at New Orleans?

A They all signed off except me, another fellow and the second mate.

Did you sail from New Orleans with 13 men?

A No; with 12.

Q Did you pick up any men at Colon?

A Yes; in Colon two signed up there and two left in Colon.

Q That would still leave 12 men in the crew?

A Yes; 12.

Q Did the A-1817 ever take any liquor or any of these spirits off of the schooner?

A Yes.

Q How much?

A They came out lots of times.

Q The A-1817 came out lots of times?

A Yes.

Q That was a speedboat?

A Yes.

Q About what size was it?

A It was about 35 feet in length.

Q How many engines did it have?

A Two engines, I think. I am not quite sure.

Q What color was it painted?

A Gray.

Q Did it have any trimmings of any other color?

A No. I didn't look close at it.

Q You don't know whether there were any other colors on it than the gray?

(Deposition of Walter Kruger)

A No.

Q How many trips did it make out there; that is, the A-1817?

A I don't know just how many.

Q About how many?

A I couldn't recall.

Q It came out there during the month of July?

A Yes.

Q When did its visits quit?

A When did the visits what?

Q When did it quit coming out?

A They quit coming out there in September.

Q The A-1817 made trips out there from July to September, then?

A Yes, sir.

Q About how many trips would you say it made a week?

A It was different. Sometimes they didn't come out for a long time.

Q What do you mean by a long time?

A Sometimes they didn't show up for about fourteen days.

Q You can't estimate the number of trips the A-1817 made?

A No.

Q How many cases would they take off with them on an average?

A Usually 200.

Q Was it as large as the "Rethalulew"?

A No.

Q How would it compare in size?

(Deposition of Walter Kruger)

A The "Rethalulew" was much bigger. I guess the "Rethalulew" was about 25 feet longer.

Q When was the first trip the "Rethalulew" made out to the schooner?

A She came out in August.

Q What time in August?

A The first week in August.

Q How many trips did the "Rethalulew" make out there while you were in that first position?

A I can't say for sure.

Q About how many?

A I don't know. It is all so long ago that I don't know.

Q About how many?

A I couldn't tell you. I don't know.

Q You say it was a long time. You mean your recollection of what you have been telling us is not very good because it was a long time ago?

A No. As I said, I don't know how many times they came out in each position, because we were in three positions.

Q You reached the first position sometime in July?

A Yes.

Q The first trip the "Rethalulew" made out there was sometime in August?

A Yes.

Q That was about the time you left the first position?

A We left that position about that time.

Q Then the "Rethalulew" didn't make any trips out to you while you were in the first position?

A No.

(Deposition of Walter Kruger)

Q Was it while you were in the first position that the Coast Guard cutter came out there?

A I guess it was the second position.

Q Did the "Rethalulew" ever take any cargo away from your vessel?

A Yes, sir. It took cargo many times.

Q How many cases would they put on the "Rethalulew"?

A It was different. Sometimes 300 or 500.

Q Did they ever put 500 on her?

A Yes; they did.

Q How do you know?

A Because we gave over the cargo to the boats. We loaded it.

Q Did you count the cases that went on?

A Yes. They had a kind of a slip.

Q I am not talking about that. I am talking about you yourself.

A They checked them.

Q Did you yourself?

A No, I didn't.

Q Do you know how many cases were put on the "Rethalulew"?

A I knew the "Rethalulew" could take about 500.

Q That is what you are forming your judgment from?

A Yes.

Q That is not a matter of memory but it is merely a matter of deduction with you?

A Yes.

(Deposition of Walter Kruger)

Q They made only a few trips while you were in the first position?

A Yes.

Q So they carried only a few cases away from there?

A Yes.

Q You went to your second position then; that was off of where?

A About off of San Pedro.

Q Did the "L'Aquila" come up while you were off the coast of San Diego?

A The "L'Aquila"?

Q Yes.

A Yes; that is where we met the "L'Aquila."

Q Off the coast of San Diego?

A Yes.

Q When you moved into the second position did the "L'Aquila" also move?

A Yes.

Q The "L'Aquila" stayed out there during the entire time you were coasting off of San Diego?

A Yes.

Q During that whole month?

A Yes.

Q When was the first time that any of the cargo was taken from the "Przemsyl" and put on the "L'Aquila"?

A We transferred the cargo from the "Przemsyl" to the "L'Aquila."

Q When?

A That was in September.

Q That was the first time any cargo had been moved from one boat to the other?

(Deposition of Walter Kruger)

A Yes.

Q Then it would be sometime in August that you moved to your second position?

A Yes.

Q Did the "L'Aquila" go with you?

A Yes, it did.

Q And anchored how far away from you? How far away from you did she anchor or ride?

A Pretty close.

Q How close?

A Only a few hundred feet away.

Q A few hundred feet?

A Yes.

Q Neither one of the boats anchored?

A No.

Q What do you mean by a "few hundred feet"? Can you give that a little more definitely?

A It all depended on how far she drifted. We were drifting.

Q How close would you be? How far apart?

A How close to the "L'Aquila"?

Q Yes. How close would the two vessels drift and how far apart?

A We drifted quicker than the "L'Aquila," so the distance would be greater.

Q What would you say was the nearest the two vessels ever got?

A About 300 feet.

Q The "L'Aquila" had its name painted on the side of the vessel, did it?

A Yes.

(Deposition of Walter Kruger)

Q Where was it?

A At the front; two names on the bow and one on the stern.

Q You mean one on either side of the bow?

A Yes.

Q And one on the stern?

A Yes.

Q What was the capacity of the "L'Aquila"? What was its tonnage? What was the size of the "L'Aquila"?

A I don't know exactly. She was about a six or seven thousand ton steamer.

Q When you took up your second position did the A-1817 continue its visits to you at that place?

A Yes.

Q The A-1817 came to the boat during the time it was at the second position?

A Yes.

Q Did it take any cargo off?

A Yes.

Q How often would it come?

A As I said before, it didn't come at regular times.

Q Sometimes it wouldn't come for a couple of weeks?

A Yes.

Q Then it would come two or three times a week?

A Yes.

Q How long did that continue? Did it continue while you were in your second and third positions?

A I don't know if it came on the third position like that or not.

Q But it did come on the second position like that?

A Yes.

(Deposition of Walter Kruger)

Q How many times did the "Rethalulew" come while you were at the second position?

A She came about the same times. Sometimes there would come the big one and then the small one again.

Q It would make visits about the same way; sometimes it wouldn't appear for a couple of weeks and then it might appear two or three times a week?

A Yes.

Q How many times did you see this man you call Strallo on the "Rethalulew"? How many times did he come on the "Rethalulew"?

A Just once.

Q Did he have a mustache at that time?

A Yes.

Q Otherwise his appearance was unchanged?

A Yes.

Q You mean it hadn't changed any except for the mustache?

A He didn't change much. His mustache made him look a little different. Otherwise he was the same as when I seen him in Hamburg.

Q While you were in the second position did he ever come to the schooner more than once?

A No.

Q Only the one time. While you were in your second position was part or all of the cargo transferred from the schooner to the "L'Aquila"?

A Yes.

Q I say was part of it or all that was left transferred?

A Just part of it.

(Deposition of Walter Kruger)

Q Part of it was on the "L'Aquila" and part was left on the "Przemysl"?

A Yes.

Q It was while you were in the second position that the revenue cutter came out to the boat?

A Yes.

Q About what time in August was that?

A That was in September.

Q What was the name of the revenue cutter?

A I don't know the name. I have forgotten the number.

Q You don't remember the name or the number?

A They had a number; C. G. and a number.

Q What?

A C. G. and then a number.

Q You mean the initials C. G.?

A Yes; C. G.

Q And a number?

A Yes.

Q Where was it when it was first sighted? Do you remember how far it was from your boat?

A She came pretty close.

Q Before she was discovered?

A We saw her coming over the horizon, and she came down to the boat and circled around. First she faced the "Rethalulew" and then she came back.

Q What?

A First she chased the "Rethalulew."

Q You mean when you saw it on the horizon the "Rethalulew" left?

A Yes.

(Deposition of Walter Kruger)

Q Who was on the boat at that time?

A Red McCluskey. Strallo was on board the "Przemysl" at that time.

Q Then he and McCluskey got on the "Rethalulew" and left?

A Yes.

Q Then the revenue cutter left and followed the "Rethalulew"?

A Yes.

Q Of course, you don't know what happened after it got out of sight, do you?

A No.

Q But it came back in about an hour?

A No. The "Rethalulew" came back.

Q Did the cost guard cutter come back to you?

A Yes.

Q It came back again?

A Yes.

Q Did it anchor or tie up?

A No; it just circled around the boat and showed its flag.

Q Then it went off again?

A Yes.

Q Then the "Rethalulew" returned to the schooner?

A Yes, it did.

Q Did you hear Cornero or Strallo, or whoever this man might have been, give any orders or instructions?

A Yes, he did.

Q To whom did he give them?

A To the captain.

Q Where?

(Deposition of Walter Kruger)

A He was on board the speedboat and came alongside and gave orders to the captain.

Q He didn't get out of the speedboat?

A No.

Q Did he call the captain over to the rail?

A Yes.

Q Where were you?

A I was there.

Q Where?

A On board the "Przemysl."

Q Were you with the captain or at your position, attending to your duties?

A I was on deck and the "Rethalulew" took some more cases of alcohol.

Q I thought you said they didn't come aboard?

A No; they didn't come aboard. She came alongside and we lifted the cases over.

Q It was while you were lifting the cases over you heard the instructions given to the Captain?

A Yes.

Q What were the instructions?

A To change positions.

Q Where did he say to go?

A Further up north. He gave him a slip. I guess the position was on there.

Q You guess it was on there?

A I know it was. I don't know what was on there.

Q How do you know what was on the slip?

A I heard them talking. Strallo said to the captain, "Here is the position. Go farther north."

(Deposition of Walter Kruger)

Q Strallo said to the captain, "Here is the position," and then added, "Go farther north"?

A Yes.

Q Then you went up north?

A Yes.

Q The same day you went up north did the "L'Aquila" go along with you?

A No. I don't know where they went.

Q Then you went up and stopped off the coast of Santa Barbara; is that right?

A Yes.

Q Did the "Rethalulew" come to the vessel while it was stopped off of Santa Barbara?

A Yes, it did.

Q How many times?

A I guess it was just two or three times.

Q On those two or three occasions did they take away a cargo?

A Yes.

Q How many cases did they take away on each of those trips?

A Not very much.

Q How much?

A They took about 400 cases each time.

Q That was on two or three trips only?

A Yes.

Q Was there any cargo left then?

A Yes.

Q How much?

A About 100 cases.

Q Then you started to go north again?

(Deposition of Walter Kruger)

A Yes.

Q Did you hear any instructions given by this man Strallo on that occasion?

A No. We started up north. Our destination was Vancouver.

Q How far north did you go?

A About as far as San Francisco.

Q About as far as San Francisco?

A Yes. Not quite as far, I think.

Q How long did it take you to get up that far?

A We had very bad weather there. We were drifting back and couldn't go against the wind. Then if we hit a northwest wind we had to pull offshore.

Q How long did you travel up there?

A I don't recall.

Q Was it one week or two weeks or three weeks that you traveled north after you left Santa Barbara?

A I can't recall.

Q Under whose instructions did you turn south and come back to Santa Barbara?

A We got a radio message.

Q Can you read a radio message?

A No.

Q Then somebody told you you got a radio message? You don't know that except from what somebody told you?

A I saw the wireless operator take it.

Q Can you read a wireless message?

A No. It was in a code.

Q Can you read the code?

A No.

(Deposition of Walter Kruger)

Q Then you don't know what was in the message, do you?

A No.

Q After that you turned around and came south to Ensenada?

A Yes.

Q Did you have any liquor aboard when you started for Ensenada?

A We had some in the drums.

Q What liquor did you have in there?

A Alcohol. We put some of the leaking cans in there.

Q What became of that liquor when you started for Ensenada?

A We dropped it into the ocean.

Q About 100 cases?

A Yes.

Q How many drums of liquor did you have when you went to Ensenada?

A About six or seven drums.

Q You cleared at Ensenada, did you not?

A Yes.

Q You got your Government clearance papers from the United States consul, did you not, at Ensenada?

A I didn't see him.

Q You were on that vessel, weren't you?

A I saw the Mexican authorities come aboard.

Q Did you see the American consul there?

A No, I didn't see him.

Q Would you say he was or wasn't there?

A I don't know if he was there or not.

(Deposition of Walter Kruger)

Q You can remember how many cases were carried off on each of these trips, but you can't remember whether the American consul came aboard at Ensenada?

A I don't know the American consul, so I don't know whether he came aboard or not.

Q But your vessel did clear at Ensenada?

A Yes.

Q With these six or seven drums of liquor on board?

A Yes; it must have been.

Q Then where did you go?

A Up to San Pedro.

Q Then what happened?

A At San Pedro or Long Beach the Coast Guard authorities closed the boat up.

Q The Coast Guard authorities?

A Yes.

Q Did you make an affidavit at any time concerning the cargo and the activities of the "Przemysl" while you were at San Pedro?

A I didn't get your meaning.

Q Were you called on to make a statement in writing, or did you sign or make a statement in writing after the boat left Ensenada and went to San Pedro or Long Beach and was libeled by the Government?

A No, I didn't make a statement.

Q Didn't you make a statement and wasn't it reduced to writing, and didn't you sign it?

A No, I didn't make any statement.

MR. DOHERTY: Tell him about what happened at my office.

(Deposition of Walter Kruger)

A That was not as I came with the "Przemysl" into San Pedro.

Q BY MR. KEARBY: That was what?

MR. DOHERTY: He made a statement to me.

A I wasn't still on the "Przemysl."

Q BY MR. KEARBY: At this time I wasn't inquiring about that.

A That was as I came back from Canada.

Q That you made the statement to Mr. Doherty?

A Yes.

Q I am talking about when your boat left Ensenada and came into Long Beach and the Government libeled your vessel. You didn't make any statement at that time?

A No.

Q That was the time I was inquiring about.

A No.

Q Have you ever made any statement to anybody concerning the activities of the "Przemysl" or the unloading of that cargo?

A No.

Q That is, except the testimony which you are now giving?

A No.

Q You made no statement to anybody?

A Well, to Mr. Doherty I made a statement before this one.

Q That was after you came down from Seattle?

A Yes.

Q That was in his office?

A Yes.

(Deposition of Walter Kruger)

Q That was the only statement that you have ever made to anybody?

A Yes.

Q Will you describe the "Rethalulew" to me?

A The "Rethalulew" is painted gray; it is about 60 feet long, and she has got a dory on deck and has got two hatches on deck, but four hatch openings; two on each side.

Q She has a dory on deck?

A Yes.

Q By that you mean a small rowboat?

A Yes.

Q Has she got anything else on deck?

A She has got a little pump on deck.

Q What else? Is it a motorboat?

A Yes.

Q How many engines has it?

A Three engines.

Q Is it painted any other color than gray?

A It is kind of a gray color.

Q Does it have any trimmings of any other color?

A I don't know if there are any trimmings.

Q Is the name painted on it? Is the name of the boat painted on it?

A Yes.

Q Where?

A On the stern.

Q That is the rear?

A Yes; the back.

Q Is it painted on the side?

A No; right on the stern, right on the back.

(Deposition of Walter Kruger)

Q The stern means the back end?

A Yes.

Q But not on the sides?

A No.

Q Did it have a cabin?

A Yes, sir.

Q Did it have sleeping accommodations or quarters?

A Yes.

Q How many?

A There is one in what they call the forecastle.

Q What?

A There is one before the wheelhouse, on the floor of the ship. You go down through the wheelhouse, down to the sleeping room.

Q It is one berth?

A No; more than that. There are four berths in that.

Q In the forepart of the cabin or the rear part?

A In the forepart.

Q How many are in the rear of the cabin?

A There is no cabin in the rear.

Q There is a partition in that cabin, isn't there, between the wheelhouse and the engines?

A Yes. (Indicating) Here is the engine; then comes the wheelhouse, and through the wheelhouse you go down to the forepart of the ship, down to the cabin there.

Q There is a partition there, too, isn't there?

A What do you mean by partition?

Q I mean there is a wall in the cabin, and in front of that is the wheelhouse; then comes a wall, and behind that there is an engine?

A Yes.

(Deposition of Walter Kruger)

Q You say there are four berths in the front part of that cabin?

A Yes.

Q Are there any berths back of the cabin where the engines are?

A No; I don't think there is a berth in the engine-room.

Q Is this your first trip to this country?

A To the States, yes.

Q This trip you made up the Pacific Coast is the first trip you had ever been up the Pacific Coast?

A Yes.

Q Where is your captain now? Is he in this country?

A I don't know.

MR. KEARBY: I believe that is all.

MR. DOHERTY: That is all.

STATE OF CALIFORNIA,)
) ss.
County of Los Angeles.)

I certify that, in pursuance of the Notice hereunto attached and the stipulations of counsel hereinbefore set forth, and on Wednesday, June 5, 1929, at the hour of ten o'clock a. m., before me, RAY E. WOODHOUSE, a Notary Public in and for the County of Los Angeles, State of California, at United States Coast Guard Base No. 17, in the City of San Pedro, County of Los Angeles, State of California, personally appeared ERIC OLAF JOHNSON and WALTER KRUGER, wit-

nesses called on behalf of the Libelant herein; and Emmett E. Doherty, Esq., Assistant United States Attorney for the Southern District of California, appeared as proctor for the Libelant, and J. W. Kearby, Esq., appeared as proctor for the respondent; and the said witnesses, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by their depositions hereto annexed.

I further certify that the depositions were then and there taken down in shorthand writing by me, and thereafter reduced to typewriting; and I further certify that, by stipulation of the proctors for the respective parties, the reading over of the depositions to the witnesses and the signing thereof were expressly waived.

I further certify that I have retained the said depositions in my possession for the purpose of delivering the same with my own hands to the Clerk of the United States District Court for the Southern District of California, the court for which the same were taken.

I further certify that I am not of counsel, nor attorney for either of the parties in said depositions and caption named, nor in any way interested in the event of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office this 10th day of June, 1929.

[Seal] RAY E. WOODHOUSE
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jun. 13, 1929 R. S. Zimmerman, Clerk, by Francis E. Cross, Deputy Clerk.

[LIBELANT'S EXHIBIT #10]

CONTRACT

THIS AGREEMENT, Made and entered into this 16th. day of May, 1928. by and between FELLOWS AND STEWART, of Wilmington, California, a co-partnership, hereinafter called the Builder and J. H. Curwin hereinafter called the Purchaser:

WITNESSETH:—That for and in consideration of the payments and mutual agreements and stipulations herein contained, the Builder and Purchaser agree as follows:

That the Builder shall furnish all material, construct and equip power boat hull for the Purchaser in accordance with the specifications hereto attached and made a part of this contract, for the sum of Five Thousand - - - -00/100 ($5,000.00), DOLLARS. Said sum or any portion thereof, payable when due at the principal place of business of the Builder at Wilmington, California, that the Purchaser binds himself to pay the Builder the said sum of $5,000.00 in gold coin of the United States of America, in the following manner:

$2,000.00 down with the signing of this contract,

$1,500.00 payable when the hull is planked and deck beams in place.

$1,500.00 payable when the hull is complete ready for the engines.

The Builder agrees to deliver said power boat hull at the works at Wilmington, California, and upon such delivery being made as aforesaid, the Purchaser shall take immediate possession thereof and the Builder shall thereupon be relieved from further liability in the care thereof,

that the Purchaser shall have proper notice of the time of said delivery.

The Builder shall have and maintain, during the prosecution of said work, full compensation insurance in accordance with the Workmens' Compensation, Insurance and Safety Act of the State of California.

Any alterations and/or additions in the said power boat hull shall be considered as extras and the Purchaser shall pay the Builder for the same in addition to the contract price set out herein, at the principal place of business hereinbefore mentioned, the reasonable value thereof, including materials furnished and labor performed, except that the Purchaser may make minor changes, provided that such changes do not increase the cost to the Builder and are mutually agreed upon in writing beforehand.

The Builder agrees to begin work within a reasonable time after the signing of this contract and to prosecute the same with reasonable diligence. It is expressly understood however, that the Builder shall not be liable for delays occasioned by Fire, Flood, Act of God, Strikes or other causes beyond its control.

The Builder agrees to construct said power boat hull in a workmanlike manner and will install all equipment, fittings and accessories called for in the above specifications in a proper and workmanlike manner. The Builder, further, guarantees any and all parts of this power boat hull which are furnished and fabricated by the Builder and will replace such parts as may prove defective within thirty days from the completion of this contract, provided it be brought to the plant of the Builder for such replacement. The Builder, however, shall not be liable in damages or otherwise for loss or damage occasioned by such defective parts beyond the obligation to replace same as above set out. No guarantees are given for fittings or equipment not fabricated by the Builder as such fittings are ordinarily covered by the guarantees of their respective makers.

It is particularly understood and agreed that at all times herein mentioned, the title and ownership of the power boat hull and accessories, both legal and equitable, shall be vested and remain vested in the Builder until the payments have been made as herein provided, and, that, at the option of the Builder, the said Builder shall and does have a lien upon it and all equipment installed thereon, as security for the payment of the payments due as herein provided, and, that, at the option of the Builder, in the event payments are not made as herein provided, the Purchaser shall forfeit all right, title and interest in and to said hull and its equipment and all payments made hereunder are to be forfeited and become the absolute property of the Builder, time being of the essence of this agreement so far as payments to be made hereunder are concerned.

Upon the delivery of the said power boat hull, the Purchaser agrees to endorse on the Builder's contract the acceptance of the same, provided it is in accordance with the specifications hereinbefore mentioned.

It is further agreed that this contract can be cancelled only by the payment of the face value of the contract and all conditions of this contract must be expressed herein in writing and made a part of it, no other conditions or agreements are to be considered unless they appear upon the face of this contract herein or the specifications hereunto attached. It is further agreed and stipulated that all taxes levied or assessed against said hull during process of construction or after its completion are to be paid and borne by the Purchaser, including the Federal Luxury Tax on pleasure boats.

This contract is executed in duplicate and each copy is to be considered as an original. This contract is binding

upon the executors, administrators, heirs or assigns of the parties hereto.

FELLOWS & STEWART,
By V. B. Stewart
..... J. H. Curwin

....
Witness. Purchaser.

[Endorsed]: 3487-M U. S. Dist. Court So. Dist. of Cal. Div. Libelants Exhibit #10 Filed May 27, 1930 Head Comr

Filed Sep 27 1930 R. S. Zimmerman, Clerk By M. L. Gaines Deputy Clerk

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[CLAIMANT'S EXHIBIT A.]

Cat. No. 1346

THE UNITED STATES OF AMERICA
Department of Commerce
Bureau of Navigation

BILL OF SALE OF ENROLLED OR LICENSED YACHT

(Secs. 4170, 4171, 4192, 4193, 4194, 4196, and 4312, Revised Statutes, and Arts. 57 and 61, Customs Regulations of 1923)

To all to whom these Presents shall come, Greeting:

Know Ye, That* J. H. CURWIN, of Los Angeles, State of California (1663 Exposition Blvd.) SOLE OWNER of the gas screw Yacht or vessel called the RETHALULEU of the burden of SIXTEEN (16)..... net tons, or thereabouts, for and in consideration of the sum of TEN ($10.00).....dollars, lawful money of the United States of America, to him in hand paid before the sealing and delivery of these presents, by† WARD DANIELS, of Pasadena, State of California (43 South

Marengo Avenue) the receipt whereof he does hereby acknowledge and is therewith fully satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said† WARD DANIELS his executors, administrators, and assigns, the whole of the said gas screw yacht or vessel, together with the whole the masts, bowsprit, sails, boats, anchors, cables, tackle, furniture, and all other necessaries thereunto appertaining and belonging; the ‡CERTIFICATE OF ENROLLMENT AND YACHT LICENSE of which said gas screw yacht or vessel is as follows, viz:

---

*Here insert the name and address of each vendor, and the part conveyed by him.

†Here insert the name and address of each vendee, and the part conveyed to him.

‡Strike out the words "Certificate of Enrollment and" when yacht is not enrolled.

11—1426

A TRUE COPY OF THE LATEST CONSOLIDATED CERTIFICATE OF ENROLLMENT AND YACHT LICENSE

THE UNITED STATES OF AMERICA

DEPARTMENT OF COMMERCE

Bureau of Navigation

Permanent or Temporary	Official No. Letters.
Permanent	227860 .....
Certificate No. 2	BHP 750 Gas Engine

Rebuilt at....., in 19..... Measured at....., 19.....
Remeasured at Los Angeles, Cal. 1928 Number of Crew 4
Service—Pleasure

†CONSOLIDATED CERTIFICATE OF ENROLLMENT AND YACHT LICENSE

‡LICENSE OF YACHT UNDER TWENTY TONS

(Section 4319, Rev. Stats., and Act of April 24, 1906)

In Conformity to Title L, "Regulation of Vessels in Domestic Commerce," and Chapter Two, Title XLVIII, "Regulation of Commerce and Navigation," of the Revised Statutes of the United States, and to "An act to amend Sections 4214 and 4218 of the Revised Statutes relating to Yachts," approved August 20, 1912

J. H. Curwin, of Los Angeles, State of California (1663 Exposition Blvd) having taken and subscribed the oath required by law, and having sworn that..... citizen.... of the United States and the sole owner.... of the vessel called the RETHALULEU, of Los Angeles and that the said vessel was built in the year 1928, at Los Angeles, Calif. of wood as appears by Certificate of Homer Evans, Principal Carpenter, Fellows & Steward Builders new vessel and O. A. Stoltz, Acting Admeasurer, having certified that the said vessel is a gas screw yacht; that she has one deck no mast, a plain head, and a square stern; that her register length is 58.0/10 feet, her register breadth 11.90/10 feet, her register depth 5.80/10 feet, her height...../10 feet; that she measures as follows:

L. O. A. 60.10

	Tons	100ths
Capacity under tonnage deck.....	23	52
Capacity between decks above tonnage deck.....		
Capacity of inclosures on the upper deck, viz:		
Forecastle.....; bridge.....; poop.....;		

break.....; houses—round....., side.....,
chart....., radio.....; excess hatchways.....; light and air.....; .....

Gross Tonnage	23	52
Deductions under Section 4153, Revised Statutes, as amended:		
Crew space,.....; Master's cabin, ...; Steering gear, ...; Anchor gear, ...; Boatswain's stores, ...; Chart house,.....; Donkey engine and boiler,.....; Radiohouse, ...; Storage of sails, ...; Propelling power (actual space.....), 7.99 32% 7.52;		
Total Deductions	7	52
Net Tonnage	16	==

The following-described spaces, and no others, have been omitted, viz: Forepeak....., aftpeak....., open forecastle....., open bridge....., open poop....., open shelter-deck....., anchor gear....., steering gear....., donkey engine and boiler....., other machinery spaces....., light and air space over propelling machinery 2.47, companions ....., skylights....., wheelhouse 1.75, galley....., condenser....., water-closets....., cabins.....

§and the said.....having agreed to the description and measurement above specified, said vessel has been duly Enrolled at this Port.

And John McClumskey, the master, having sworn that he is a citizen of the United States, that this vessel, used and employed exclusively as a PLEASURE VESSEL, and designed as a model of Naval Architecture, shall not, while this license continues in force, transport merchandise

or carry passengers for pay, or engage in any unlawful trade, nor in any way violate the revenue laws of the United States, and shall comply with the laws in all other respects:

LICENSE is hereby granted for the said YACHT to proceed from port to port in the United States without entering or clearing at the Customhouse, and to foreign ports without clearing in the United States. This LICENSE will continue and be in force for ONE YEAR from the date hereof, or until the return of the said YACHT from a foreign port (when she shall be entered at the Customhouse), and no longer.

Given under my hand and seal at the Port of Los Angeles, California, District of Los Angeles No. 27, this 30th day of July, in the year one thousand nine hundred and twenty-eight (1928)

....

Comptroller of Customs. Collector of Customs.

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†Strike out line, if vessel is licensed only.

‡Strike out line, if vessel is enrolled.

§Strike out this and following line, if vessel is licensed only.

11—1426

To have and to hold the said gas screw Yacht called "RETHALULEU" and appurtenances thereunto belonging unto him the said WARD DANIELS, his executors, administrators, and assigns, to the sole and only proper use, benefit, and behoof of him the said WARD DANIELS, his executors, administrators, and assigns forever: And he the said J. H. Curwin has promised, covenanted, and agreed, and by these presents does promise, covenant, and agree, for himself, his executors,

administrators, and assigns, to and with the said WARD DANIELS, his executors, administrators, and assigns to warrant and defend the said gas screw Yacht —or— vessel and all the other before-mentioned appurtenances against all and every person and persons whomsoever

In testimony whereof, The said J. H. Curwin has hereunto set his hand and seal this 5th day of December, in the year of our Lord one thousand nine hundred and twenty-eight (1928)

Signed, sealed, and delivered in presence of—

G D Price J. H. Curwin [Seal]

T Rippingall

11—1426

State of California }
County of Los Angeles } ss:

Be it known, That on this 5th day of December, 1928, personally appeared before me,[2] J. H. Curwin and acknowledged the within instrument to be his free act and deed.

In testimony whereof, I have hereunto set my hand and seal this fifth day of December, A. D. 1928.

[Seal] M A White

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 26, 1931

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[1] This acknowledgment may be made to conform to requirements of State laws.

[2] If the vendor is a corporation, write:

....., "who being duly sworn, deposed and said that he is the president, secretary, or other officer or agent [the

acknowledgment of an instrument by a corporation must be made by some officer thereof authorized to execute it by the board of directors of the corporation. If the corporation has no seal, that fact must be stated in place of the statement respecting the seal,] of the [name of corporation], the corporation which is described in and executed the within instrument, and that he knows the seal of the said corporation and that it is affixed and was so affixed to the within instrument by order of the board of directors of the said corporation at whose order he signed his name and acknowledged the within instrument to be the free act and deed of the said corporation," or such other words as may be required by State laws.

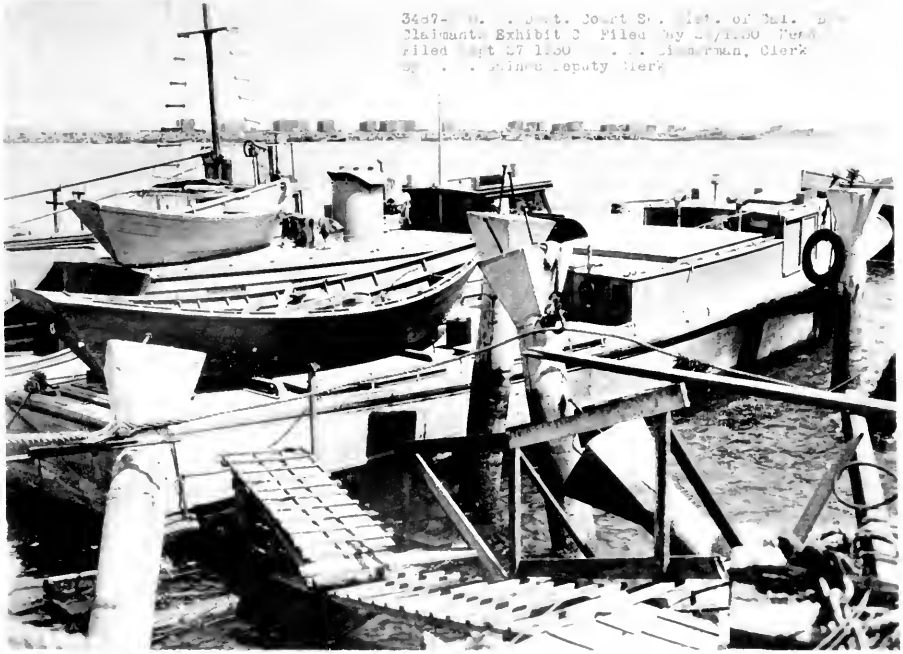
Cat. No. 1346 Department of Commerce Bureau of Navigation Bill of Sale of Enrolled or Licensed Yacht J. H. Curwin to Ward Daniels Gas Screw Yacht called the Rethaluleu Port of Los Angeles, Calif. 12/5/28, 19..... Received for record, 12 h. 00 m. —M. Recorded, book 1345/1, page 23 B. F. Witt Act. Dep. Collector of Customs.

Fee for recording 1.80 paid Receipt No. 222994, Dec 5, 1928

3487-M U. S. Dist. Court So. Dist. of Cal. Div. Claimants Exhibit A Filed May 27/30 Head Commr

[Endorsed]: Filed Sep 28 1930 R. S. Zimmerman, Clerk By M. L. Gaines Deputy Clerk

3457- . . . Dist. Court S. . Dist. of Cal. .
Claimant's Exhibit C Filed by . /1950 Peru
Filed Sept 27 1950 . . . Sherman, Clerk
By . . . Deputy Clerk



[TITLE OF COURT AND CAUSE.]

COMMISSIONER'S REPORT.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

The above entitled cause was referred to the undersigned as Commissioner to hear the evidence and report to the court the conclusions of law and of fact. The matter was set down for the taking of testimony and there appeared for the libelant Louis J. Somers, Esq. and Harry G. Balter, Esq., Assistant United States Attorney, and for the respondent, Otto Christensen, Esq. Testimony was taken on May 27, 28, and 29, 1930, and thereafter counsel presented their arguments by the filing of written briefs.

The issues are framed upon the original libel and amendments thereto. The libel charges the respondent vessel with the smuggling of intoxicating liquor into the United States, and, further, that the vessel engaged in a trade other than that for which she was licensed; that the respondent vessel proceeded on a foreign voyage without first giving up her license to the Collector of the district; that the respondent vessel was fraudulently registered; that the respondent vessel was laden and unladen with merchandise without a special license or permit issued therefor by the Collector of Customs; that the respondent vessel violated her license by transporting merchandise for pay, and that the respondent vessel failed to report to the Collector of Customs upon arrival from a foreign port

It is recommended that a decree be entered declaring the respondent vessel forfeited to the United States and that all costs be assessed against the claimant.

Respectfully submitted,

David B. Head,
Commissioner.

[Endorsed]: Filed Aug 27 1930 R. S. Zimmerman, Clerk By M. L. Gaines Deputy Clerk

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[Title of Court and Cause.]

EXCEPTIONS TO COMMISSIONER'S REPORT

The Triple Gas Screw Motor Boat "Rethalulew", respondent herein, and Ward Daniels, claimant, hereby except to the report of the Commissioner, made and filed herein on August 27, 1930, for the following reasons and upon the following grounds:

I.

Respondent and claimant specifically except to the finding that on September 30, 1928, the respondent made contact with the schooner "PRZEMSYL" at a point off the coast of Southern California, and removed from the "PRZEMSYL" a large quantity of intoxicating liquors to another vessel, "L'AQUILA", for the reason that said finding is not supported by sufficient evidence, and is contrary to the evidence offered on that point. That the findings of fact in said report are indefinite, ambiguous, vague and incomplete, and do not find facts sufficient to support the conclusions of law, for that the said findings of fact on which the Commissioner bases his conclusion of law No. 1 do not state at what times or dates during the

months of August and September, 1928, the respondent vessel was absent from her home port, nor that on such absences from her home port the respondent made contact with the schooner "PRZEMSYL" and took from the "PRZEMSYL" cargoes consisting of intoxicating liquors, and the respondent and claimant are thus unable to more specifically except to such finding.

II.

That there is no word of testimony or any other evidence in the entire record in this case showing that the cargoes of the vessels "PRZEMSYL" and "L'AQUILA" were intended to be smuggled into the United States, nor any evidence that any portion of their cargo ever came within the twelve mile limit.

III.

That said findings of fact are contrary to the evidence adduced by the respondent and claimant on the trial of this case, which evidence was wholly uncontradicted by the libelant. (Tr. 106, 122, 126, 145, 169, 186, 198, 214, 217)

IV.

Respondent and claimant except to the refusal of the Commissioner to admit and consider the evidence of the witness Leonard Wood, and in refusing the offer of proof made in connection therewith. (Tr. 106, 113, 114, 123, 124)

V.

Respondent and claimant except to the refusal of the Commissioner to admit and consider the evidence of the witness L. H. Williams, and in refusing the offer of proof made in connection therewith. (Tr. 119, 120, 121)

VI.

Respondent and claimant except to the refusal of the Commissioner to admit and consider the evidence of the witness Homer H. Evans, and in refusing the offer of proof made in connection therewith. (Tr. 126, 127, 128)

VII.

Respondent and claimant except to the action of the Commissioner in admitting in evidence "patrol boat log book U. S. Coast Guard cutter CG 253" without any proper foundation being laid therefor, and that said log was not properly identified and proved, and is not a public record. (Tr. 46, 47, 48)

VIII.

Respondent and claimant except to the finding of the commissioner that the claimant was not a bona fide purchaser in good faith, without notice, and for value, of the respondent vessel, in that the evidence on that point offered by the claimant was wholly undisputed and uncontradicted, and the libelant offered no evidence thereon. (Tr. 192, 193, 196, 199, 205, 213)

IX.

Respondent and claimant except to the refusal of the Commissioner to find that the claimant was a bona fide purchaser for value, without notice, of the respondent vessel, and entitled to be protected in his purchase.

X.

Respondent and claimant except to the findings and conclusions of the Commissioner herein on the ground that said findings, conclusions, and the ruling thereon, are manifestly erroneous, unsupported by the evidence, and contrary to the weight of the evidence.

XI.

That conclusion of law #2 is wholly unsupported by the evidence, and is directly contradictory to the evidence offered by the respondent and claimant on the point that the respondent vessel was not unlawfully registered.

XII.

Respondent and claimant except to the refusal of the Commissioner to make finding of fact #1 requested by the claimant and respondent.

XIII.

Respondent and claimant except to the refusal of the Commissioner to make finding of fact #2 requested by the claimant and respondent.

XIV.

Respondent and claimant except to the refusal of the Commissioner to find the conclusions of law requested by the claimant and respondent.

XV.

Respondent and claimant except to conclusion of law #1, for the reason that said conclusion of law is not supported by the findings of fact, in that said findings of fact do not show that the respondent vessel engaged in a trade other than that for which she was registered.

XVI.

Respondent and claimant except to conclusion of law #1 for the reason that said conclusion is against law, in that it is contrary to the evidence and is not sustained by sufficient evidence.

XVII.

Respondent and claimant except to conclusion of law #2 for the reason that said conclusion of law is not

sustained by the findings of fact, in that said findings do not show that the respondent vessel was fraudulently registered.

XVIII.

Respondent and claimant except to conclusion of law #2, in that it is founded upon a presumption without support in law, is wholly unsupported by the evidence, and is against law.

XIX.

Respondent and claimant except to the finding of the Commissioner that the owner and master of the respondent vessel must be presumed to have known that the respondent vessel was to be used for a purpose other than that for which she was registered, there being no evidence in the record to support any such presumption.

WHEREFORE, the respondent and claimant respectfully request that the ruling of the Commissioner in his report herein be reversed, that this action be dismissed, and that the respondent boat "RETHALULEW" be released from the attachment and restored to her present owner, the claimant and intervenor, Ward Daniels.

Dated August 30, 1930.

Respectfully submitted,

Otto Christensen

Attorney for respondent, and claimant Ward Daniels.

POINTS AND AUTHORITIES.

The respondent and claimant offer as their points and authorities upon which the above exceptions are based, the brief of said claimant filed herein before the Commissioner, which said brief was heretofore filed in the office of the Clerk of this Court.

[Endorsed]: Received copy of the within Exceptions to Commissioner's Report this 2nd day of September, 1930. Samuel W. McNabb, United States Attorney By I. F. Parker Attorney for Libelant Filed Sep 2—1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

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At a stated term, to wit: The September, Term, A. D. 1930, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday, the 19th day of September, in the year of our Lord one thousand nine hundred and thirty

Present:

The Honorable PAUL J. McCORMICK, District Judge.

United States of America, Libellant,	)
vs.	)
Triple Gas Screw Motor Boat "Rethalluleu," Official No. 227,860, Respondent,	) No. 3487-M-Adm.
Ward Daniels, Claimant,	)

The exceptions of claimant and respondent herein to the report of the Commissioner made and filed herein on August 27, 1930, are and each is, overruled and denied. Exceptions are allowed to claimant and respondent to each of the aforesaid rulings.

The said report of said Commissioner is confirmed and the recommendations therein are adopted, and it is ac-

cordingly ordered that a decree be entered herein declaring the respondent vessel forfeited to the United States with all costs herein against claimant. An exception to the aforesaid ruling is hereby noted and allowed to respondent and claimant respectively. See written conclusions of the Court filed herein this day.

Dated at Los Angeles, California, Friday, September 19, 1930

[TITLE OF COURT AND CAUSE.]

LOUIS J. SOMERS, Esq. Asst. United States Attorney of Los Angeles, California, for the United States.

OTTO CHRISTENSEN, Esq., of Los Angeles, California, for Respondent and Claimant.

CONCLUSIONS OF THE COURT.

The exceptions of claimant and respondent herein to the report of the Commissioner made and filed herein on August 27, 1930, are and each is, overruled and denied. Exceptions are allowed to claimant and respondent to each of the aforesaid rulings.

The said report of said Commissioner is confirmed and the recommendations therein are adopted, and it is accordingly ordered that a decree be entered herein declaring the Respondent vessel forfeited to the United States with all costs herein against Claimant. An exception to the aforesaid ruling is hereby noted and allowed to Respondent and Claimant respectively.

In amplification of the ruling confirming the Commissioner's report herein, it is sufficient to state that an examination of the evidence before the Commissioner re-

veals that assuming that the Commissioner erred in excluding proffered evidence as to the whereabouts of the speed boats, "A-1817" and "The Seal," it was shown by sufficient and satisfactory evidence that the "Rethaluleu" on and about September 30, 1928, engaged in a trade other than that for which she was registered and that said vessel was fraudulently registered. Such conclusion is supported not solely by the depositions of Kruger and Johnson, but is clearly inferable and proven by other independent facts and circumstances in the record. But it is not clear that the Commissioner erred in excluding the proffered evidence. The Commissioner ruled that the proffered matter was collateral to the issue before him and that at best the matter was offered as impeachment of the witnesses Kruger and Johnson, and being impeachment upon collateral matters, it was irrelevant and immaterial to the issue as to the "Rethaluleu." There is considerable strength in this position. But assuming error, it was not substantial or prejudicial because even if taken as refutation of the testimony of Johnson and Kruger as to any contact by "The Seal" or "A-1817" during July, August and until the middle of September, other independent and undisturbed evidence that the "Rethaluleu" contacted with the "Przemysl" in the latter part of September, 1930, amply sustains the Commissioner's ruling that the libeled vessel was engaged in a trade for which she was not registered. The exceptions to the Master's report are overruled, the report is confirmed, and a decree in accordance therewith is ordered with costs to libelant.

Paul J. McCormick
United States District Judge

Dated at Los Angeles, California, Friday, September 19, 1930

[Endorsed]: Filed Sep 19 1930 R. S. Zimmerman, Clerk By B B Hansen Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause having been heard by stipulation of the parties by the Commissioner appointed by this court with authority to hear the issues, take testimony, make findings and report his conclusions and recommendations to the court, and the Commissioner having heard the issues and having filed his findings and report, and the court having heard the exceptions filed by claimant to said report, and having heard the argument of respective counsel on said exceptions, and said exceptions having been submitted to the court for decision, and the court having read the transcript and considered all the evidence adduced at the hearing and having considered the exceptions filed to the Commissioner's report, finds

I.

That the Triple Gas Screw Motor Boat "RETHALULEU" is an American vessel of sixteen tons net, powered with three Liberty motors;

II.

That she was registered and licensed on July 30, 1928, at the port of Los Angeles, San Pedro, California, to one James H. Curwin, owner, and John McCluskey as Master, to be "used and employed exclusively as a pleasure vessel,

and designed as a model of Naval Architecture, shall not, while this license continues in force, transport merchandise or carry passengers for pay, or engage in any unlawful trade, nor in any way violate the revenue laws of the United States, and shall comply with the laws in all other respects."

III.

That the Triple Gas Screw Motor Boat "RETHALULEU", Official Number 227860, was seized by the United States Coast Guard on or about April 20, 1929, and was attached by the United States Marshall under the process of this court on April 23, 1929, and is now and has been at all time since April 20, 1929, within the jurisdiction of this court.

IV.

That on or about September 30, 1928, the respondent vessel made contact with the schooner "Przemsyl" at a point off the coast of California and removed from said schooner "Przemsyl" to another vessel called "L'Aquila" a large cargo of merchandise consisting of intoxicating liquor and at said time was not licensed to carry cargo and that at said time said vessels "Przemsyl" and "L'Aquila" were lying off the southern coast of the state of California with cargoes of liquor on board which said cargoes were intended to be smuggled into the United States.

V.

That during the months of August and September, 1928, the respondent vessel was frequently absent from her home port and that during that period of time she made contact on several occasions with the schooner "Przemsyl" and took from the "Przemsyl" cargoes, and at

said times was not licensed to carry cargoes, or to engage in trade.

VI.

That since July 30, 1928, John McCluskey was the Master of the Triple Gas Screw Motor Boat "RETHALULEU", Official Number 227860, and continued as Master till seizure.

VII.

That the vessel was licensed December 5, 1928, to the claimant, Ward Daniels, and the said John McCluskey at the same time took the Master's oath required by law.

VIII.

That the Triple Gas Screw Motor Boat, "RETHALULEU", Official Number 227860, was fraudulently enrolled and licensed on June 30, 1928, in the United States Custom House, San Pedro, California, in that at said time and place the owner and Master, knowing that the Triple Gas Screw Motor Boat "RETHALULEU" was not to be used exclusively for pleasure and that said motor boat would be used in trade, knowingly and fraudulently represented that the said Triple Gas Screw Motor Boat "RETHALULEU", Official Number 227860, would be used exclusively for pleasure and would not be used in trade.

IX.

That libelant has not sustained the additional causes of action pleaded by amendment.

CONCLUSIONS OF LAW.

From the said facts so found as matters of law the court concludes:

That

I.

The Triple Gas Screw Motor Boat "RETHALULEU", Official Number 227860, was fraudulently registered in violation of Title 46, Section 60, United States Code. (4189 Revised Statutes)

II.

That the Triple Gas Screw Motor Boat "RETHALULEU" Official Number 227860, engaged in trade in violation of her license and in violation of Title 46, Section 325 U. S. Code. (4377 Revised Statutes)

III.

The Triple Gas Screw Motor Boat "RETHALULEU", should be and said motor boat is hereby condemned as forfeited to the United States of America, and libelant have all costs.

DATED this 6th day of Oct, 1930.

Paul J. McCormick
United States District Judge.

Approved as to form as required by Rule 44.

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Attorney for claimant, Ward Daniels.

[Endorsed]: Filed Oct 27 1930 R. S. Zimmerman, Clerk; by Murray E. Wire Deputy Clerk

[TITLE OF COURT AND CAUSE.]

DECREE.

The Triple Gas Screw Motor Boat "Rethaluleu", having been seized by the United States Coast Guard on April 20, 1929, for violations of law, and the libel of information having been filed in the above entitled cause, United States of America vs. Triple Gas Screw Motor Boat "Rethaluleu", Official Number 227860, her engines, furniture, apparel, etc., and the monition and process having been issued in accordance with the prayer of the said libel, and the Marshal for the Southern District of California having returned on the monition so issued that he attached the said vessel, her engines, furniture, apparel, etc., described in the said libel of information, and has given due notice to all persons claiming the same, that this court would on the 13th day of May, A. D., 1929, proceed to the trial and condemnation of the said vessel, her engines, furniture and apparel, etc., should no claim be interposed for the same, and proclamation having been made for all persons interested in the said vessel, its engines, furniture, apparel, etc., to appear and interpose their claims and to show cause why prayer of said libel should not be granted, and a default of all persons who have not appeared having been entered, and Ward Daniels having appeared and filed his intervening petition and answer to the libel, and the issues by stipulation of the parties having been referred to Honorable David B. Head for hearing and for his report thereof, and thereafter by leave of court, the libel herein having been amended and the cause having proceeded to trial before David B. Head, Commissioner, on the issues raised by the libel and the

amendments thereto, and the answers of claimant, Ward Daniels, and the Commissioner having filed his report and recommendations herein on August 27, 1930, wherein he found that the Triple Gas Screw Motor Boat "Rethaluleu", engaged in a trade other than that for which she was registered, in violation of Title 46, Sec. 325, U. S. Code, (4377 Revised Statutes) and also found that the vessel was fraudulently registered in violation of Title 46, Sec. 60, U. S. Code, (4189 Revised Statutes), and also found that the libelant had failed to sustain the remaining causes of action as pleaded by amendments to the libel, and the claimant having filed his exceptions to the Commissioner's report and said exceptions having been presented to and heard by the District Court for the Southern District of California, and the United States District Court for the Southern District of California having heard and having considered the exceptions to said report, and having considered all the testimony before the Commissioner and the arguments of respective counsel, and said United States District Court having on September 19, 1930, filed its conclusions on the exceptions to said report, and having entered its minute order wherein and whereby the exceptions of the claimant and respondent to the report of the Commissioner filed herein on August 27, 1930, were each overruled and denied, and said Court having ordered the report of said Commissioner in all respects be approved and confirmed,

IT IS ORDERED, ADJUDGED AND DECREED that the additional causes of action pleaded by libelant in its amendment to the libel filed May 16, 1930, be and each of said additional causes of action is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Triple Gas Screw Motor Boat "Rethaluleu," Official Number 227860, her engines, furniture, apparel, etc., described in the libel in this cause, be and the same accordingly are condemned as forfeited to the United States of America,

And it further appearing that the Secretary of the Treasury by letter dated May 13, 1929, by virtue of the discretion conferred by Sec. 2 of the Act of Congress approved March 3, 1925, entitled "An Act relating to the Use and Disposition of Vessels or Vehicles Forfeited to the United States for Violation of the Customs Laws or National Prohibition Act and for other Purposes" requested that the American Speedboat "Rethaluleu," her engines, tackle, apparel and equipment, if forfeited, be delivered to Commander, Section Base 17, U. S. Coast Guard, San Pedro, California, for use in the enforcement of the Customs Laws as provided by the said Act, and the court having considered the request,

IT IS BY THE COURT ORDERED that the Triple Gas Screw Motor Boat "Rethaluleu," Official Number 227860, be delivered by the United States Marshal for the Southern District of California to Commander, Section Base 17, U. S. Coast Guard, San Pedro, California, for use in the enforcement of the Customs Laws; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that claimant herein, Ward Daniels, pay all costs including costs of storage and care of the vessel taxed in the sum of $2837.64.

DATED this 6th day of October, 1930.

Paul J. McCormick
United States District Judge.

Approved as to form as required by Rule 44.

Order that decree be filed; together with findings of fact and conclusions of law.

John R. Hazel

D J.

Decree entered and recorded Oct 27 1930 R. S. Zimmerman Clerk, By Murray E. Wire, Deputy Clerk.

[Endorsed]: Filed Oct 27 1930 R. S. Zimmerman, Clerk, By Murray E. Wire, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL

To the Hon. John R. Hazel, Judge Presiding of said court:

Now come the respondent and claimant by Otto Christensen, their proctor, and feeling aggrieved by the final decree of this court entered on the 27th day of October, 1930, hereby pray that an appeal may be allowed to them from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit and, in connection with this petition, petitioners herewith present their assignment of errors.

Petitioners further pray that an order of supersedeas may be entered herein pending the final disposition of the cause and that the amount of security may be fixed by the order allowing this appeal.

Otto Christensen,
Proctor for respondent and claimant.

ORDER

Upon reading and filing the foregoing petition for appeal it is by the court ordered that said appeal be allowed, that an order of supersedeas be entered herein, and the amount of the supersedeas bond is hereby fixed at the sum of $2500.

Dated at Los Angeles, California this 1, day of November, 1930.

John R. Hazel
United States District Judge

Supersedeas bond in the sum of $2500.00 is acceptable by reason of stipulation allowing Coast Guard to keep vessel in condition, pursuant to stipulation filed this date.

Nov. 1, 1930

I F Parker
Asst. U. S. Atty.

[Endorsed]: Filed Nov 1 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

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[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Now come the appellants, the Triple Gas Screw Motor Boat "Rethalulew" and Ward Daniels, by Otto Christensen, their proctor, and in connection with their petition for appeal say that, in the record, proceedings and in the final decree aforesaid, manifest error has intervened to the prejudice of appellants, to-wit:

I.

That the Commissioner erred in finding as a fact that on September 30, 1928 the respondent vessel made contact

with the schooner "Przemsyl" at a point off the coast of Southern California, and removed from the "Przemsyl" a large quantity of intoxicating liquors to another vessel, the "L'Aquila," the said finding of fact being wholly unsupported by the evidence and contrary thereto, in that the evidence fails to show that the respondent vessel "Rethalulew" made contact with the schooner "Przemsyl" at a point off the coast of Southern California on said date, or at any other time.

II.

That the Commissioner erred in finding as a fact that during the months of August and September, 1928 the respondent vessel was frequently absent from her home port, and that during that period of time she made contact on several occasions with the schooner "Przemsyl" and took from the "Przemsyl" cargoes consisting of intoxicating liquors, for that said finding is wholly unsupported by the evidence and is contrary thereto and that said finding of fact is indefinite, ambiguous, vague and incomplete, in that said finding of fact does not state at what times or on what dates during the months of August and September, 1928 the respondent vessel was absent from her home port, nor the dates of the absences of the respondent vessel from her home port on which respondent made contact with the schooner "Przemsyl" and took from the "Przemsyl" cargoes consisting of intoxicating liquors.

III.

That the Commissioner erred in finding as a fact that the vessels "Przemsyl" and "L'Aquila" were lying off the coast of Southern California with cargoes of liquor on board, which cargoes of liquor were intended to be smuggled into the United States, for that said finding is wholly

unsupported by the evidence and is contrary thereto, there being no evidence that the cargoes of the vessels "Przemsyl" and "L'Aquila" were intended to be smuggled into the United States, and no evidence that any portion of their cargoes were ever brought into the territorial limits of the United States by the respondent vessel, or by any other vessel.

IV.

That the Commissioner erred in finding that the owner and master of the respondent vessel knew at the time of registration that the respondent vessel was to be used for a purpose other than that for which she was registered, said finding being wholly unsupported by the evidence, and contrary thereto, in that there is no evidence in the record showing that the owner and master knew at the time of registration that the respondent vessel was to be used for a purpose other than that for which she was registered.

V.

That the Commissioner erred in making his conclusion No. I, to-wit, that the motor boat "Rethalulew" engaged in a trade other than that for which she was registered in violation of Title 46, Sec. 325, United States Code, in that said conclusion is wholly unsupported by the evidence, is contrary thereto, and is not supported by any findings of fact, in that the evidence and findings do not show that the respondent vessel engaged in a trade other than that for which she was registered, and that said Conclusion No. I is against law.

VI.

That the Commissioner erred in making his conclusion No. II, to-wit, that the said vessel was fraudulently registered in violation of Title 46, Sec. 60 of the United States Code, for that said conclusion No. II is wholly unsupported by the evidence and is contrary thereto, and is not sustained by the findings, for the reason that the evidence and the findings show conclusively that the respondent vessel was not fraudulently registered, that said conclusion No. II is founded upon a presumption, and is against law.

VII.

That the Commissioner erred in recommending that a decree be entered in this cause declaring the respondent vessel forfeited to the United States, with all costs to be assessed against claimant, the same being contrary to law.

VIII.

That the Commissioner erred in refusing to admit and consider the evidence of the witness Leonard Wood, and in refusing the offer of proof made by the respondent and claimant in connection therewith.

IX.

That the Commissioner erred in refusing to admit and consider the evidence of the witness L. H. Williams, and in refusing the offer of proof made by the respondent and claimant in connection therewith.

X.

That the Commissioner erred in refusing to admit and consider the evidence of the witness Homer H. Evans, and in refusing the offer of proof made by respondent and claimant in connection therewith.

XI.

That the Commissioner erred in admitting in evidence "Patrol Boat Log Book U. S. Coast Guard Cutter CG 253," libelant's Exhibit 8, for the reason that no proper foundation was laid therefor, that said log was not properly identified and proved, and is not a public record.

XII.

That the Commissioner erred in finding that the owner and master of the respondent vessel was to be used for a purpose other than that for which she was registered, there being no evidence whatsoever in the records to support any such presumption.

XIII.

That the Commissioner erred in finding that the claimant was not a bona fide purchaser, in good faith, without notice, and for value, of the respondent vessel, in that the evidence on that point offered by the claimant was wholly undisputed and uncontradicted, and the libelant offered no evidence thereon.

XIV.

That the Commissioner erred in refusing to find that the claimant was a bona fide purchaser for value, without notice, of the respondent vessel, and entitled to be protected in his purchase, in that the uncontradicted evidence shows that claimant bought the respondent vessel and paid full value therefor before the said vessel was libeled in this proceeding, or seized herein, and without notice of any claim of forfeiture to be made by the libelant, and that the evidence contained in this record fails to support any claim of forfeiture of the vessel as against the rights of claimant.

XV.

That the Commissioner erred in refusing to make finding of fact No. I requested by the respondent and claimant.

XVI.

That the Commissioner erred in refusing to make finding of fact No. II requested by the claimant and respondent.

XVII.

That the Commissioner erred in refusing to find the conclusions of law requested by the claimant and respondent.

XVIII.

That the Commissioner erred in making his findings and conclusions for the reason that said findings, conclusions and the ruling thereon are manifestly erroneous, wholly unsupported by the evidence and contrary to law.

XIX.

That the court erred in approving and confirming the findings of fact, conclusions of law and the report of the Commissioner herein by its conclusions entered herein on Friday, September 19, 1930.

XX.

That the court erred in making and signing its findings of fact No. I, No. II, No. III, No. IV, No. V, *Bo.* VI, No. VII and No. VIII, and its conclusions of law No. I, No. II and No. III, made and signed on October 6, 1930 and entered herein on October 27, 1930, for the reason that this cause had heretofore and on the 3rd day of February, 1930, by a written stipulation entered into by all the parties hereto and their respective proctors, Samuel W. McNabb, United States Attorney, Emmet E. Doherty,

Assistant United States Attorney, and Otto Christensen, proctor for respondent and claimant, and confirmed by the order of the District Court entered on February 3, 1930, mutually consenting and agreeing that this cause be referred for trial to David B. Head, Commissioner, and that said Commissioner should have authority to take testimony, to continue the trial from day to day, to make findings of fact, and make a report thereon, and that after the trial of this cause by said Commissioner and his making findings of fact, conclusions and recommendation, the court had no further jurisdiction in the matter, except to examine the testimony and see if there was any evidence to support the Commissioner's findings, and if there should be such evidence, confirm said report, and after said reference by consent to said Commissioner the said court was without power or jurisdiction to add to, alter, amend or make any other or further findings of fact and conclusions of law than those heretofore made by the Commissioner under such consent reference.

XXI.

That the court erred in making its finding of fact No. IV, to-wit, that on or about September 30, 1928 the respondent vessel made contact with the schooner "Przemsyl" at a point off the coast of Southern California and removed from said schooner "Przemsyl" to another vessel called the "L'Aquila" a large cargo of merchandise consisting of intoxicating liquor, and that at said time said vessels "Przemsyl" and "L'Aquila" were lying off the southern coast of the State of California with cargoes of liquor on board, which said cargoes were intended to be smuggled into the United States, the said finding of fact is wholly unsupported by the evidence, and is contrary

thereto, in that the evidence does not show that the respondent vessel "Rethalulew" made contact with the schooner "Przemsyl" at a point off the coast of Southern California on said date, or at any other time, and there being no evidence of any kind whatsoever that the cargoes of the vessels "Przemsyl" and "L'Aquila" were intended to be smuggled into the United States, and no evidence that any portion of their cargoes was ever brought into the territorial limits of the United States by the respondent vessel, or by any other vessel.

XXII.

That the court erred in making its finding of fact No. V that during the months of August and September, 1928 the respondent vessel was frequently absent from her home port and that during that period of time she made contact on several occasions with the schooner "Przemsyl" and took from the "Przemsyl" cargoes, for that said finding is wholly unsupported by the evidence, and is contrary thereto, and that said finding of fact is indefinite, ambiguous, vague and incomplete, in that said finding of fact does not state at what times or on what dates during the months of August and September, 1928 the respondent vessel was absent from her home port, nor the dates of the absences of the respondent vessel from her home port on which the respondent vessel made contact with the schooner "Przemsyl" and took from the "Przemsyl" cargoes.

XXXIII.

That the court erred in making its finding of fact No. VIII, to-wit, "that the Triple Gas Screw Motor Boat 'Rethalulew,' Official No. 227860, was fraudulently en-

rolled and licensed on June 30, 1928, in the United States Custom House, San Pedro, California, in that at said time and place the owner and master, knowing that the Triple Gas Screw Motor Boat "Rethalulew" was not to be used exclusively for pleasure and that said motor boat would be used in trade, knowingly and fraudulently represented that the said Triple Gas Screw Motor Boat "Rethalulew," Official No. 227860, would be used exclusively for pleasure and would not be used in trade," for that said conclusion is wholly unsupported by the evidence, and is contrary thereto, in that the evidence shows that the respondent vessel was not engaged in a trade other than that for which she was registered and the evidence further shows that the owner and master of the respondent vessel did not make any fraudulent representations in registering the respondent vessel and did not knowingly and fraudulently represent that the said Triple Gas Screw Motor Boat "Rethalulew" would be used exclusively for pleasure and would not be used in trade.

XXIV.

That the court erred in making its conclusion of law No. I, the same being against law.

XXV.

That the court erred in making its conclusion of law No. II, the same being against law.

XXVI.

That the court erred in making its conclusion of law No. III, the same being against law.

XXVII.

That the court erred in finding the issues for the libelant.

XXVIII.

That the court erred in decreeing that the respondent Triple Gas Screw Motor Boat "Rethalulew," her engines, furniture, apparel, etc., be condemned and forfeited to the United States of America, and in decreeing that the said Triple Gas Screw Motor Boat "Rethalulew" be delivered by the United States Marshal for the Southern District of California to Commander Section Base 17, United States Coast Guard, San Pedro, California, for use in the enforcement of the custom laws, and in decreeing that the claimant herein, Ward Daniels, pay all costs, including costs of storage and care of said vessel, for that the said decree is against the manifest weight of the evidence, and is contrary to law.

XXIX.

That the said decree is contrary to law.

XXX.

That the court erred in making and entering its findings of fact and conclusions of law, and decree herein, for that the said findings of fact, conclusions of law and decree were made and signed by the Judge, Paul J. McCormick, beyond the jurisdiction of the District Court of the United States for the Southern District of California, and were made and signed by Paul J. McCormick, a Judge of the District Court of the United States for the Southern District of California, while in the State of New York and not within the State of California.

WHEREFORE, appellants pray that the decree of the District Court of the United States for the Southern District of California be reversed and remanded with directions to proceed in accordance with the law.

Otto Christensen
Proctor for Appellants.

[Endorsed]: Filed Nov 1 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING AMENDMENT TO ASSIGNMENT OF ERRORS.

For good cause shown, it is by the court ordered that the respondent and claimant be allowed to file an amendment to the Assignment of Errors heretofore filed by them in this cause on November 1, 1930, by adding to Assignment No. 8, Assignment No. 9 and Assignment No 10, the offers of proof made by the respondent and claimant on the trial of this cause, and rejected by the Commissioner, to which rulings exceptions were duly taken and allowed.

Dated at Los Angeles, California this 4 day of November, 1930.

John R Hazel
United States District Judge.

[Endorsed]: Filed Nov 4 1930 R. S. Zimmerman, Clerk By M. R. Winchell Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

AMENDMENT TO ASSIGNMENT OF ERRORS.

Now come the respondent and claimant and by leave of court first had and obtained, file this amendment to the Assignment of Errors heretofore filed in this cause on November 1, 1930, so that Assignment of Errors No. 8, No 9 and No. 10 shall read as follows:

VIII.

That the Commissioner erred in refusing to admit and consider the evidence of the witness Leonard Wood, and

by refusing the offer of proof made by respondent and claimant in connection therewith. Said evidence and offer of proof so excluded and rejected being in words and figures as follows:

"MR. CHRISTENSEN: I now offer to prove by this witness that he would identify the pictures marked Respondent's Exhibits 1, 2 and 3, which bear the stamp: 'Filed December 14, 1929, R. S. Zimmerman, Clerk, by B. B. Hanson, Deputy Clerk.' The same being exhibits taken from the file in the case of United States vs. The Motor Boat 'Seal' No. 3488-J; that he would identify those pictures as pictures of 'The Seal.' Secondly, I offer to prove by this witness that his occupation during the months of July, August and September, 1928, was to check all boats in the private harbor of the Los Angeles Ship Yards at San Pedro, California, and to check all service charges on boats that lay in the pond; also to make bills and collect bills from such boats. I next offer to prove that in connection with his duty it was not only his duty to check all boats in the pond, but when they arrived and "when they left the pond. That the check of the pond was made twice daily, at 9 o'clock in the morning and 4 o'clock in the afternoon; that he kept a record of the boats indicating when they arrived and when they left; that I will prove by this witness that 'The Seal' was in the pond of the Los Angeles Ship Company, its yards, on various dates from June 22nd to September 5, 1928. I will prove by this witness that he would identify the Respondent's Exhibit No. 6 in said case of United States vs. 'The Seal' heretofore identified, and would testify that said exhibit was a record on the boat 'The Seal,' for June, July and August, of the time of arrival in the pond and

the time of leaving the pond. I will further prove by this witness that the boat 'The Seal,' with the exception of an occasion one day, which I believe was either the month of July or August, was always in the harbor at Los Angeles, or at the Los Angeles Ship Yards. I think that is all, and I will also offer in evidence on those offers of proof, the exhibits I have heretofore identified, so I may have separate rulings on that."

IX.

That the Commissioner erred in refusing to admit and consider the evidence of the witness L. H. Williams, and in refusing the offer of proof made by the respondent and claimant in connection therewith. Said evidence and offer of proof so excluded and rejected being in words and figures as follows:

"MR. CHRISTENSEN: I now offer to prove by this witness that on the 5th day of July, 1928, he saw a boat, motor boat 'A-1817', and that the boat that he saw was the boat appearing in the picture that I heretofore offered to prove as the picture of the 'A-1817;' that he saw that boat on the 5th day of July, 1928. Next offer to prove that he saw that boat at San Nicholas Island, and that San Nicholas Island is about 40 miles southwest of San Pedro Harbor; further offer to prove that at *tht* time he saw the 'A-1817' at that time, that the 'A-1817' was swamped and in a water-logged condition, and that he boarded the boat on July 5, 1928. I further offer to prove by this witness that he will testify that the boat at the time he boarded it was in a water-logged condition and had been so for a day or two. Further offer to prove by this witness that he took her in tow and towed her toward San Pedro Harbor; that while so towing her to San Pedro

Harbor the boat, the 'A-1817,' became loose from the patrol ship 257 on which the witness was at that time; that he so lost the boat on the night of July 6th, and later found it in the early morning of July 7th; and that the 'A-1817' was then towed to San Pedro. I may say that the testimony shows here Santa Barbara. The transcript should have read San Pedro. The boat was taken to the base at the Los Angeles Ship Yards at that time. Offer to prove all of that and each and every separate offer of proof."

X.

That the Commissioner erred in refusing to admit and consider the evidence of the witness Homer H. Evans, and in refusing the offer of proof made by the respondent and claimant in connection therewith. Said evidence and offer of proof so excluded and rejected being in words and figures as follows:

"MR. CHRISTENSEN: I will offer to prove by this witness, if the court please, that the boat 'Seal' as appearing from the exhibits heretofore offered in evidence, Respondent's Exhibits 1, 2 and 3 in this case of the United States vs. 'The Seal', heretofore identified, that this witness would identify those pictures, and he would testify that that boat was built by Fellows & Stewart, and that he was the witness who identified those particular exhibits in the case against 'The Seal.' I offer further to show that he would testify that 'The Seal' was about 50 feet long and 10 feet wide and about 36 inch draft, and is a general cruiser type of boat, and that 'The Seal' was launched—I will separately offer to prove that 'The Seal' was launched by him on the 6th day of June, 1928; that the color of the boat was gray. I further offer to prove

that 'The Seal' went out on June 26th and came back into their ship yard on July 1st; that he will testify to the work done on the boat during the month of July and also the work done on the boat in the month of August; that from the pictures he would show the pilot house was changed. We will offer to prove that certain changes in the structure of the boat were made in the month of July, with reference to the location of the pilot house, the same being moved from the front to about the center of the boat; also that on August 15, the lettering on the boat was changed to the stern of the boat, and that thereafter no lettering appeared on the sides of the boat. That from the testimony of this witness he would further prove and account for the location of the boat at all times and places unaccounted for by the other witnesses during the months of July and August, and until the middle of September."

Otto Christensen
Proctor for Respondent and Claimant.

[Endorsed]: Filed Nov 4 1930 R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk

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[Title of Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective counsel, that on or about the 1st day of October, 1930 counsel for libelant presented to Otto Christensen, proctor for the respondent and claimant, proposed findings of fact, and conclusions of law, and a decree in the above entitled

cause for the approval of counsel for claimant as to form; that said counsel for respondent and claimant excepted to the form of said findings of fact, conclusions of law and decree, and attached on the last page of both said documents his objections to the proposed findings and decree; that thereafter, on October 2, 1930, Louis J. Somers, Assistant United States Attorney, counsel for appellant, forwarded said proposed findings and decree to the Hon. Paul J. McCormick, Judge of the District Court of the United States for the Southern District of California, in New York City, State of New York, for his signature, with the said objections of counsel for claimant attached thereto; that said findings of fact, conclusions of law and decree were signed by the Hon. Paul J. McCormick in New York City on October 6, 1930 and were by him forwarded from New York City to the office of the Clerk of said District Court of the United States and entered herein on October 27, 1930; that when said findings and decree were filed with the Clerk on October 27, 1930 it was discovered that the objections made by counsel for respondent and claimant to said findings of fact, conclusions of law and decree, and attached thereto, had in some manner become detached from the originals of said findings and decree so made and signed by the Hon. Paul J. McCormick, Judge, in New York City, and forwarded by him to the Clerk of the Court as aforesaid;

It is further stipulated and agreed that correct carbon copies of said objections of respondent and claimant to said findings and decree are attached to this stipulation and may be filed herewith as the objections made by

counsel for respondent and claimant as to the form of said findings and decree.

Dated at Los Angeles, California this 3rd day of November, 1930.

Samuel W. McNabb
United States Attorney
By Louis J. Somers
Assistant United States Attorney
Otto Christensen
Proctor for Respondent and Claimant.

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The respondent and claimant object to the court making the above or any findings of fact and conclusions of law in this cause, for the reason that this cause was referred by consent of the libelant, respondent and claimant, in writing, to Commissioner David B. Head for trial, to take testimony, to continue the trial from day to day, and make findings of fact and report thereon, which reference by consent was duly approved by the court; that the Referee has made findings of fact and conclusions of law in this cause and reported to the court; that the court has in all things confirmed the said report, findings of fact, and conclusions of law of the Referee in the matter; that claimant and respondent filed exceptions to the findings of fact and conclusions of law, which were duly overruled by the court and exceptions thereto allowed; that no hearing was had in said court upon the issues in said cause other than to hear arguments upon the exceptions to the Referee's findings of fact and conclusions of law; that

the proposed findings of fact and conclusions of law are at variance with and materially different than the findings of fact and conclusions of law filed by the Commissioner in said cause, and the respondent and claimant object to the court making any or further findings of fact or conclusions of law in this matter, other than the conclusions of the court heretofore made and filed herein on September 19, 1930, approving and confirming the findings of fact and conclusions of law of the Referee.

Otto Christensen
Proctor for Respondent and Claimant

OBJECTIONS TO PROPOSED DECREE

That the court's order was that a decree be submitted in accordance with the master's report, but said decree is at variance therewith in that it decrees that said speed boat "Rethalulew," her engines, tackle, apparel and equipment, be delivered to Commander, Section Base 17, U. S. Coast Guard, San Pedro, California, for use in enforcing the Custom Laws as provided by said Act, because it appears that the Secretary of the Treasury by letter dated May 13th, 1929 made such request, which said letter nowhere appears in the evidence, report and findings of the Referee, and such mode of forfeiture not having been made an issue by any of the pleadings or any of the evidence adduced at the trial of this cause; and to said portion of the decree the further objection is made that the claimant has given notice to the United States that claimant proposes to appeal from any final decree in said cause and file a supersedeas bond on said appeal, and that said portion of said proposed decree would be inconsistent and

in conflict with the rights of said claimant until said decree becomes final upon the judgment of the United States Circuit Court of Appeals, and the further objection to the decree that the costs to be paid by the claimant are not fixed by the decree.

Otto Christensen
Proctor for Respondent and Claimant

[Endorsed]: Filed Nov 3 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

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[Title of Court and Cause.]

NOTICE OF FILING SUPERSEDEAS AND COST BOND.

To the above named Appellee and to Messrs. Samuel W. McNabb and Louis J Somers, attorneys for Appellee:

YOU WILL PLEASE TAKE NOTICE that on the 5th day of November, 1930 the appellants above named filed in the office of the Clerk of this court a supersedeas and cost bond in the sum of $2750.00, with Myra Jane Bertleson as surety thereon, and that the residence of said surety, Myra Jane Bertleson, is 1023 South Bedford Street, Los Angeles, California, and that said bond was duly approved by the Judge of said District Court on November 5th, 1930.

Dated at Los Angeles, California this 6th day of November, 1930.

Otto Christensen
Proctor for Appellants.

Received copy of the above notice this 6th day of November, 1930.

Samuel W. McNabb
United States Attorney
By Louis J. Somers,
Asst. United States Attorney

[Endorsed]: Filed Nov 6 1930 R. S. Zimmerman Clerk By M L Gaines Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

SUPERSEDEAS AND COST BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, Ward Daniels, as principal, and Western Surety Company, a Corporation, as Surety, are held and firmly bound unto the United States of America, in the full and just sum of Twenty-seven hundred and fifty Dollars ($2750.00), lawful money of the United States, to be paid to the said United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of November, in the year of our Lord One Thousand Nine Hundred and Thirty.

WHEREAS, lately in the District Court of the United States for the Southern District of California, Central Division, in a suit pending in said Court, between the United States of America, Libelant, and Triple Gas Screw Motor Boat "Rethalulew," Official No. 227860, Respond-

ent, and Ward Daniels, Claimant, a judgment was rendered against the said Triple Gas Screw Motor Boat "Rethalulew," Respondent, and Ward Daniels, Claimant, forfeiting said respondent boat to the United States of America, and against the said Claimant, Ward Daniels, for costs in the sum of $2837.64, and the said Respondent boat and the Claimant Ward Daniels having obtained from said United States District Court for the Southern District of California, an appeal, and order of supersedeas therein, to reverse the judgment in the aforesaid suit, and a Citation directed to the said United States of America, Libelant and Appellee, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the first Monday in February, 1931.

Now, the condition of the above obligation is such, that if the said Triple Gas Screw Motor Boat "Rethalulew," Official No. 227860, Respondent and Appellant, and Ward Daniels, Claimant and Appellant, shall prosecute their said appeal to effect, and answer all damages and costs if they fail to make their said plea good, and will abide by and perform whatever decree may be rendered by said Circuit Court of Appeals in the cause, or on the mandate of said Circuit Court of Appeals to the said District Court, then the above obligation to be void; else to remain in full force and virtue.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 10th day of November, 1930.

Ward Daniels
Principal
905 W. Hadley
Whittier, Calif.,
(Address)

Western Surety Company
Surety
by P. F. Kirby (SEAL)
(Address)
Vice President

.....
Surety

.....
(Address)

Examined and recommended for approval as provided in Rule 28.

Otto Christensen
ATTORNEY for Claimant
I. F. Parker,
Asst. U. S. Attorney for Libelant
APPROVED November ....., 1930.
JOHN R. HAZEL
District Judge.

STATE OF CALIFORNIA,)
County of Los Angeles) SS.

ON THIS 10th day of November A. D., 1930, before me, E. D. TATE, a Notary Public in and for the said County and State, personally appeared P. F. Kirby known

to me to be the Vice President of the Western Surety Company, the Corporation that executed the within instrument, known to me to be the persons who executed the within instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL) E. D. Tate

Notary Public in and for said County and State.

My Commission Expires Sept. 15, 1932.

[Endorsed]: Filed Nov. 12 1930. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CONSENT OF SUPERSEDEAS BOND SURETY TO STIPULATION OF THE PARTIES HERETO FILED NOVEMBER 1, 1930.

The Western Surety Company, by its Agent Bart Bertelson, hereby consents to the terms of the Stipulation entered into by the parties hereto and filed in this matter November 1, 1930, concerning the use of the Gas Screw Vessel "RETHALULEW', Official No. 227860, pending decision of this case on appeal or until final determination of this matter.

DATED: This 12th day of November, 1930.

WESTERN SURETY COMPANY,

By Bart Bertelson

Bart Bertelson.

Agent.

[Endorsed]: Filed Nov 12 1930. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION.

It is hereby stipulated by and between the United States of America, Libelant, and Ward Daniels, Claimant, that Libelant's exhibits numbers 1-4-7-12-13-14- and 15, together with the photographs and two signature cards at the end of the deposition of Eric Olaf Johnson, in the above entitled action may be certified and transmitted by the Clerk of the United States District Court to the United States Circuit Court at San Francisco and may be used for all purposes on appeal with the same force and effect as though they had been incorporated in the transcript of record.

It is further stipulated that in the preparation of the record on appeal, that in all headings and documents and pleadings in lieu of the full title of the court and cause the words "title of court and cause" may be used, and the name of the document, and that all the backs of all papers may be omitted except the Clerk's filing stamp.

Samuel W McNabb
United States Attorney
Louis J Somers
Assistant United States Attorney
For Libelant.

Otto Christensen
For Claimant.

[Endorsed]: Filed Dec 11 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

PRAECIPE FOR RECORD ON APPEAL

To the Clerk of said Court:

Please prepare record on appeal herein to include the following pleadings, papers, motions, proceedings and orders in the above entitled cause:

1. (a) The style of the court.

(b) The names of the parties, setting forth the original parties and those who have become parties before the appeal.

(c) The process of arrest or attachment and stipulation or bail taken.

2. The libel and amendments thereto, with Exhibits annexed thereto.

3. The pleadings of the respondent or claimant with the exhibits annexed thereto.

4. The testimony as taken on the part of the libelant and any exhibits annexed thereto, being plaintiff's Exhibits No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 10, No. 12, No. 13, No. 14 and No. 15.

5. The testimony as taken on the part of the respondent and claimant and Exhibits A, B and C.

6. Commissioner's report.

7. Exceptions to Commissioner's report.

8. Minute order of the court made September 19, 1930.

9. Conclusions of the court made September 19, 1930.

10. Findings of fact and Conclusions of Law.

11. Decree.

12. Petition for appeal and assignment of errors.

13. Citation and proof of service.

14. Order allowing amendment to assignment of errors.

15. Amendment to assignment of errors.

16. Stipulation dated November 13, 1930 and objections to findings of fact, conclusions of law and decree.

17. Supersedeas and cost bond.

18. Praecipe for record on appeal.

Otto Christensen

Proctor for Appellants.

[Endorsed]: Received copy of the within Praecipe this 13 day of November, 1930 Samuel W. McNabb, United States Attorney By Louis J Somers Asst U. S. Attorney. Attorney for Appellee Filed Nov 13 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

No. 6352

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WARD DANIELS,
Claimant and Appellant,

TRIPLE GAS SCREW MOTOR BOAT "RETHALULEW," Official No. 227860,
Respondent,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee.

Appeal from the District Court of the United States of America, in and for the Southern District of California, Central Divison

Brief of Appellant

OTTO CHRISTENSEN,
Broadway Arcade Building
Los Angeles, California,
Attorney for Appellant.

Los Angeles Review, Law Printers, 120 So. Spring St., Los Angeles. TU 1377

SUBJECT INDEX

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III.

CITATIONS AND AUTHORITIES

AUTHORITIES—*Continued*

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WARD DANIELS,
Claimant and Appellant,

TRIPLE GAS SCREW MOTOR BOAT "RETHALULEW," Official No. 227860,
Respondent,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee.

Brief of Appellant

Statement of the Case.

This cause originated in a libel brought by the United States of America against the Triple Gas Screw Motor Boat "Rethalulew," seeking to have the said vessel forfeited to the United States for various alleged offenses against the shipping and revenue laws. The condemnation and forfeiture of the respondent vessel was sought on the following alleged grounds set out in the libel:

(1) For alleged smuggling of intoxicating liquor into the United States in violation of law. 46 *U. S. C. A.* Sec. 21. (R. 6-7).

(2) That the respondent vessel was enrolled and licensed as a pleasure yacht and engaged in trade other than that for which she was licensed. 46 *U. S. C. A.* Sec. 325. (R. 3-4-5-6).

(3) That the respondent vessel proceeded on a foreign voyage without first giving up her license to the Collector of the district. 46 *U. S. C. A.* Sec. 278. (R. 7-8).

(4) For an alleged fraudulent registry of the respondent vessel by its owner and master. 46 *U. S. C. A.* Sec. 60. (R. 8).

(5) That the respondent vessel was laden and unladen with cargo and merchandise of the value of $500 or more, without a special license or permit therefor, issued by the Collector of Customs. 19 *U. S. C. A.* Sec. 266. (R. 22-23).

(6) That the respondent vessel, while enrolled as a pleasure vessel, was operating in violation of her license in the transportation of merchandise for pay. 46 *U. S. C. A.* Sec. 103. (R. 23-24).

(7) That the respondent vessel arrived from a foreign port or place with dutiable merchandise on board and failed to report to the Customs Officer of the United States at the port or place of her arrival, and failed to deliver to said officer a manifest of all dutiable articles brought from some foreign country or place in such yacht or vessel, in violation of her license. 46 *U. S. C. A.* Sec. 106. (R. 24).

The said libel was filed on April 22nd, 1929, and on

said day an order for process duly issued, and under said process the respondent vessel was seized by the United States Marshal for the Southern District of California, and is still held in his possession.

The claimant and appellant, Ward Daniels, duly filed an answer to the libel, in which is set up the ownership of the "Rethalulew" by the claimant and appellant by purchase from the original owner, James H. Curwin, on December 5th, 1928, for the sum of $9542; that Curwin was the first owner of the boat, which was registered with the Collector of Customs at San Pedro, California; that the transfer of the respondent vessel to claimant and appellant was evidenced by a bill of sale duly recorded with the Collector of Customs, and the immediate delivery of the possession of the respondent vessel to the claimant and appellant; that claimant had no knowledge and no notice, actual or constructive, of any unlawful use of the respondent vessel by its previous owner or master, and that the respondent vessel was purchased by claimant in good faith; the answer further specifically denied all of the allegations of the libel and prayed for an appraisal and delivery of the respondent vessel to the claimant, that the action be dismissed, and for general relief (R. 14-15-16-17-18-19-20-21).

Thereafter, and on February 3rd, 1930, a stipulation was entered into between the United States District Attorney for the Southern District of California and Otto Christensen, proctor for claimant and appellant, that an order be entered by the court referring the trial of this cause to David B. Head, Commissioner, and that said Commissioner shall have authority to take

testimony and continue the trial from day to day, to make findings of fact and make a report thereon, and such order was duly entered pursuant to such stipulation by the Hon. Paul J. McCormick, United States District Judge for the Southern District of California, before whom this cause was pending (R. 375, 386).

Thereafter, the said cause came on for trial before the Hon. David B. Head, Commissioner, on May 27th, 1930, and the trial thereof concluded on May 29th, 1930, and thereafter counsel presented their arguments in the matter by the filing of written briefs (R. 375).

Thereafter, and on August 27th, 1930, the Commissioner made and filed his report to the court, in which report he made the following findings of fact and conclusions of law:

> "That the said vessel was registered on July 30, 1928, with the Collector of Customs at the port of Los Angeles as a pleasure vessel by one, James H. Curwin, as owner and John McClusky as master;
>
> That on or about September 30, 1928, the respondent vessel made contact with the schooner 'Przemsyl' at a point off the coast of Southern California and removed from the 'Przemsyl' a large quantity of intoxicating liquors to another vessel, 'L'Aquila,' and that the vessels 'Przemsyl' and 'L'Aquila' were lying off the coast of Southern California with cargoes of liquor on board which said cargoes were intended to be smuggled into the United States;
>
> That during the months of August and September, 1928, the respondent vessel was frequently absent from her home port and that during that period of time she made contact on several occasions

with the schooner 'Przemsyl' and took from the 'Przemsyl' cargoes consisting of intoxicating liquors;

That during all the times above referred to the master of the vessel was the aforesaid John McCluskey and the said McCluskey continued as master of said vessel until the vessel was taken into custody by the United States Marshal under the process of this case.

That the vessel was licensed December 5, 1928, to the claimant, Ward Daniels, and the said John McCluskey at the same time took the master's oath required by law.

Requests for findings of fact in addition to the above have been made by both parties. The Commissioner is unable to find that the evidence establishes that intoxicating liquors were brought into the territorial limits of the United States by the respondent vessel. Further, the Commissioner is unable to find that the claimant, Ward Daniels, stands as an innocent purchaser but on the contrary, the circumstances surrounding his purchase of the vessel should have put him upon inquiry. The short period of time elapsing between the date of registration of the vessel and the violations of her registry gives rise to the presumption that the owner and the master knew at the time of registration that the vessel was to be used for a purpose other than that for which she was registered.

Wherefore, it is concluded:

1. That the motor boat 'Rethalulew' engaged in a trade other than that for which she was registered, in violation of Title 46, Sec. 325, United States Code;

2. That the said vessel was fraudulently registered, in violation of Title 46, Sec. 60 United States Code;

3. That the other charges of the libel have not been sustained.

It is recommended that a decree be entered declaring the respondent vessel forfeited to the United States and that all costs be assessed against the claimant.

Respectfully submitted,

DAVID B. HEAD,
Commissioner."

(R. 376-378)

Thereafter, and on the 2nd day of September, 1930, the claimant and appellant seasonably filed his exceptions to the Commissioner's report (R. 378-9, 380-81-82), and the said exceptions to the Commissioner's report were duly argued by counsel for appellant and appellee.

Thereafter, and on the 19th day of September, 1930, the court duly overruled and denied the exceptions of claimant and respondent to the report of the Commissioner and allowed exceptions to said ruling, said order of the District Court being in words and figures as follows:

"The exceptions of claimant and respondent herein to the report of the Commissioner made and filed herein on August 27, 1930, are and each is, overruled and denied. Exceptions are allowed to claimant and respondent to each of the aforesaid rulings.

The said report of said Commissioner is confirmed and the recommendations therein are adopted, and it is accordingly ordered that a decree be entered herein declaring the respondent vessel forfeited to the United States with all costs herein against claimant. An exception to the aforesaid ruling is

hereby noted and allowed to respondent and claimant respectively. See written conclusions of the Court filed herein this day.

Dated at Los Angeles, California, Friday, September 19, 1930." (R. 383-4-5).

Thereafter, in the State of New York, and on the 6th day of October, 1931, the Hon. Paul J. McCormick, Judge of the United States District Court for the Southern District of California, in whose court this cause was then pending, made and entered other and different findings of fact and conclusions of law than those theretofore made and found by the Commissioner who tried the case, which were approved by the Court on September 19, 1930, and a decree ordered to be entered thereon (R. 386-7-8-9); and on the said 6th day of October, 1930, the Hon. Paul J. McCormick, as a District Judge for the Southern District of California, being then and there in the City of New York, in the State of New York, signed and made his decree in this cause (R. 389-91-92; 408-9-10). That the appellant and respondent have never consented to or ratified the act of said District Court of the State of California in sitting in the State of New York, and there making and signing its findings of fact, conclusions of law, and decree in this case, as made and signed by said Court on October 6th, 1930.

Thereafter, and on the 1st day of November, 1930, the appellant and respondent filed their petition for appeal, to which petition for appeal was attached assignment of errors, upon which petition for appeal and assignment of errors the District Court duly made an order allowing said appeal, and a citation on appeal

was thereupon duly issued and served upon the appellee, together with a copy of the petition for appeal, assignment of errors and order allowing appeal (R. 393-4-5-6-7-8-9, 400-1-2-3-4-5-6-7-8, and p. 2).

Thereafter, and on the 6th day of November, 1930, a notice of filing supersedeas and cost bond in the sum of $2750 was duly filed and served upon the attorneys for appellee. (R. 412-413-414-415).

Specification of Errors on Which Appellant Will Rely.

I.

That the Commissioner erred in finding as a fact that on September 30, 1928, the respondent vessel made contact with the schooner "Przemsyl" at a point off the coast of Southern California, and removed from the "Przemsyl" a large quantity of intoxicating liquors to another vessel, the "L'Aquila," the said findings of fact being wholly unsupported by the evidence and contrary thereto, in that the evidence fails to show that the respondent vessel "Rethalulew" made contact with the schooner "Przemsyl" at a point off the coast of Southern California on said date, or at any other time. (A. E. 1, R. 394).

II.

That the Commissioner erred in finding as a fact that during the months of August and September, 1928, the respondent vessel was frequently absent from her home port, and that during that period of time she made contact on several occasions with the schooner "Przemsyl" and took from the "Przemsyl" cargoes con-

sisting of intoxicating liquors, for that said finding is wholly unsupported by the evidence and is contrary thereto and that said finding of fact is indefinite, ambiguous, vague and incomplete, in that said finding of fact does not state at what times or on what dates during the months of August and September, 1928, the respondent vessel was absent from her home port, nor the dates of the absences of the respondent vessel from her home port on which respondent made contact with the schooner "Przemsyl" and took from the "Przemsyl" cargoes consisting of intoxicating liquors (A. E. 2, R. 395).

III.

That the Commissioner erred in finding as a fact that the vessels "Przemsyl" and "L'Aquila" were lying off the coast of Southern California with cargoes of liquor on board, which cargoes of liquor were intended to be smuggled into the United States, for that said finding is wholly unsupported by the evidence and is contrary thereto, there being no evidence that the cargoes of the vessels "Przemsyl" and "L'Aquila" were intended to be smuggled into the United States, and no evidence that any portion of their cargoes were ever brought into the territorial limits of the United States by the respondent vessel, or by any other vessel. (A. E. 3, R. 395).

IV.

That the Commissioner erred in finding that the owner and master of the respondent vessel knew at the time of registration that the respondent vessel was to be used for a purpose other than that for which she

was registered, said finding being wholly unsupported by the evidence, and contrary thereto, in that there is no evidence in the record showing that the owner and master knew at the time of registration that the respondent vessel was to be used for a purpose other than that for which she was registered. (A. 2-4, R. 396).

V.

That the Commissioner erred in making his conclusion No. 1, to-wit, that the motor boat "Rethalulew" engaged in a trade other than that for which she was registered in violation of Title 46, Sec. 325, United States Code, in that said conclusion is wholly unsupported by the evidence, is contrary thereto, and is not supported by any findings of fact, in that the evidence and findings do not show that the respondent vessel engaged in a trade other than that for which she was registered, and that said Conclusion No. 1 is against law. (A. E. 5, R. 396).

VI.

That the Commissioner erred in making his conclusion No. 2, to-wit, that the said vessel was fraudulently registered in violation of Title 46, Sec. 60 of the United States Code, for that said conclusion No. 2 is wholly unsupported by the evidence and is contrary thereto, and is not sustained by the findings, for the reason that the evidence and the findings show conclusively that the respondent vessel was not fraudulently registered, that said conclusion No. 2 is founded upon a presumption, and is against law. (A. E. 6, R. 397).

VII.

That the Commissioner erred in admitting in evidence "Patrol Boat Log Book U. S. Coast Guard Cutter CG 253," libelant's Exhibit 15, for the reason that no proper foundation was laid therefor, that said log was not properly identified and proved, and is not a public record. (A. E. 11, R. 398).

VIII.

That the Commissioner erred in refusing to admit and consider the evidence of the witness Leonard Wood, and by refusing the offer of proof made by respondent and claimant in connection therewith. Said evidence and offer of proof so excluded and rejected being in words and figures as follows:

> "Mr. Christensen: I am going to offer to prove first : "Q.—Do you remember having seen motor boat 'A-1817' at any time during the months of June, August and September, 1928?" And that this witness would answer; "yes"; and the following question: "Q.—You say you saw motor boat 'A-1817' during the months of July and August, 1928?" and the answer to that question "Yes." And to the question: "Q.—Where did you see it during those two months?" His answer would be: "I saw her when they brought her into the yards; when she was brought into the yard by the Coast Guard Cutter"; and the following question: "Q.—About when did they bring her in?" "A.—On July 9, 1928"; that would be his answer. That to the question: "If it was July 9, 1928," that he saw the boat brought in, that he would answer to that question, "Yes, sir, that is the date that the boat

was hauled out on the Marine Ways"; and the question: "How long did she remain there," his answer would be: "She remained there from July 9th until September 15th." "Q.—What was done to her at that time." To that his answer would be "The 'A-1817' was overhauled and the motors were taken out and cleaned"; "Q.—Was there any change made of the location of the cabin?" And his answer would be: "Yes, sir." And the question: "How long was the 'A-1817' on the Ways?" His answer would be: "We had it in our custody from July 9, 1928, to September 15, 1928." (A. E. 8, R. 120, 121).

IX.

That the Commissioner erred in refusing to admit and consider the evidence of the witness L. H. Williams, and in refusing the offer of proof made by the respondent and claimant in connection therewith. Said evidence and offer of proof so excluded and rejected being in words and figures as follows:

"Mr. Christensen: I now offer to prove by this witness that on the 5th day of July, 1928, he saw a boat, motor boat 'A-1817,' and that the boat that he saw was the boat appearing in the picture that I heretofore offered to prove as the picture of the 'A-1817'; that he saw that boat on the 5th day of July, 1928. Next offer to prove that he saw that boat at San Nicholas Island, and that San Nicholas Island is about 40 miles southwest of San Pedro Harbor; further offer to prove that at the time he saw the 'A-1817,' at that time, that the 'A-1817' was swamped and in a water-logged condition, and that he boarded the boat on July 5, 1928. I further offer to prove by this witness that he will testify

that the boat at the time he boarded it was in a water-logged condition and had been so for a day or two. Further offer to prove by this witness that he took her in tow and towed her toward San Pedro Harbor; that while towing her to San Pedro Harbor the boat, the 'A-1817,' became loose from the patrol ship 257 on which the witness was at that time; that he so lost the boat on the night of July 6th, and later found it in the early morning of July 7th; and that the 'A-1817' was then towed to San Pedro. I may say that the testimony shows here Santa Barbara. The transcript should have read San Pedro. The boat was taken to the base at the Los Angeles Ship Yards at that time. Offer to prove all of that and each and every separate offer of proof." (A. E. 9, R. 406).

X.

That the Commissioner erred in finding that the claimant was not a bona fide purchaser, in good faith, without notice, and for value, of the respondent vessel, in that the evidence on that point offered by the claimant was wholly undisputed and uncontradicted, and the libelant offered no evidence thereon. (A. E. 13, R. 398).

XI.

That the Commissioner erred in refusing to find that the claimant was a bona fide purchaser for value, without notice, of the respondent vessel, and entitled to be protected in his purchase, in that the uncontradicted evidence shows that claimant bought the respondent vessel and paid full value therefor before the said vessel was libeled in this proceeding, or seized herein, and

without notice of any claim of forfeiture to be made by the libelant, and that the evidence contained in this record fails to support any claim of forfeiture of the vessel as against the rights of claimant. (A. E. 14, R. 398).

XII.

That the court erred in making its finding of fact No. 4, to-wit, that on or about September 30, 1928, the respondent vessel made contact with the schooner "Przemsyl" at a point off the coast of Southern California and removed from said schooner "Pszemsyl" to another vessel called the "L'Aquila" a large cargo of merchandise consisting of intoxicating liquor, and that at said time said vessels "Przemsyl" and "L'Aquila" were lying off the southern coast of the State of California with cargoes of liquor on board, which said cargoes were intended to be smuggled into the United States, the said finding of fact is wholly unsupported by the evidence, and is contrary thereto, in that the evidence does not show that the respondent vessel "Rethalulew" made contact with the schooner "Przemsyl" at a point off the coast of Southern California on said date, or at any other time, and there being no evidence of any kind whatsoever that the cargoes of the vessels "Przemyl" and "L'Aquila" were intended to be smuggled into the United States, and no evidence that any portion of their cargoes was ever brought into the territorial limits of the United States by the respondent vessel, or by any other vessel. (A. E. 21, R. 400-401).

XIII.

That the court erred in making its finding of fact No. 5 that during the months of August and September, 1928, the respondent vessel was frequently absent from her home port and that during that period of time she made contact on several occasions with the schooner "Przemsyl" and took from the "Przemsyl" cargoes, for that said finding is wholly unsupported by the evidence, and is contrary thereto, and that said finding of fact is indefinite, ambiguous, vague and incomplete, in that said finding of fact does not state at what times or on what dates during the months of August and September, 1928, the respondent vessel was absent from her home port, nor the dates of the absences of the respondent vessel from her home port on which the respondent vessel made contact with the schooner "Przemsyl" and took from the "Przemsyl" cargoes. (A. E. 22, R. 401).

XIV.

That the court erred in making its finding of fact No. 8, to-wit, "that the Triple Gas Screw Motor Boat "Rethalulew," Official No. 227860, was fraudulently enrolled and licensed on June 30, 1928, in the United States Custom House, San Pedro, California, in that at said time and place the owner and master, knowing that the Triple Gas Screw Motor Boat "Rethalulew" was not to be used exclusively for pleasure and that said motor boat would be used in trade, knowingly and fraudulently represented that the said Triple Gas Screw Motor Boat "Rethalulew," Official No. 227860, would be used exclusively for pleasure and would not be used

in trade," for that said conclusion is wholly unsupported by the evidence, and is contrary thereto, in that the evidence shows that the respondent vessel was not engaged in a trade other than that for which she was registered and the evidence further shows that the owner and master of the respondent vessel did not make any fraudulent representations in registering the respondent vessel and did not knowingly and fraudulently represent that the said Triple Gas Screw Motor Boat "Rethalulew" would be used exclusively for pleasure and would not be used in trade. (A. E. 23, R. 401).

XV.

That the court erred in making its conclusion of law No. 1, the same being against law. (A. E. 24, R. 402).

XVI.

That the court erred in making its conclusion of law No. 2, the same being against law. (A. E. 25, R. 402).

XVII.

That the court erred in making its conclusion of law No. 3, the same being against law. (A. E. 26, R. 402).

XVIII.

That the court erred in finding the issues for the libelant. (A. E. 27, R. 402).

XIX.

That the court erred in decreeing that the respondent Triple Gas Screw Motor Boat "Rethalulew," her engines, furniture apparel, etc., be condemned and forfeited to the United States of America, and in decree-

ing that the said Triple Gas Screw Motor Boat "Rethalulew" be delivered by the United States Marshal for the Southern District of California to Commander Section Base 17, United States Coast Guard, San Pedro, California, for use in the enforcement of the custom laws, and in decreeing that the claimant herein, Ward Daniels, pay all costs, including costs of storage and care of said vessel, for that the said decree is against the manifest weight of the evidence, and is contrary to law. (A. E. 28, R. 403).

XX.

That the said decree is contrary to law. (A. E. 29, R. 403).

XXI.

That the court erred in making and entering its findings of fact and conclusions of law, and decree herein, for that the said findings of fact, conclusions of law and decree were made and signed by the Judge, Paul J. McCormick, beyond the jurisdiction of District Court of the United States for the Southern District of California, and were made and signed by Paul J. McCormick a Judge of the District Court of the United States for the Southern District of California, while in the State of New York and not within the State of California. (A. E. 30, R. 403).

BRIEF OF ARGUMENT

I.

The Findings and Judgment in this Case Are Coram Non Judice and Void.

We shall first argue Specification No. 21 (A. E. 30, R. 403, 408, 409) as it is decisive of this case in favor of appellant. The findings of fact, conclusions of law, and decree made and signed in this case by the Judge of the United States District Court for the Southern District of California, in whose court this cause was then pending, were non-judicial acts and void—a nullity in law. The record shows that the findings of fact, conclusions of law and the decree were made and signed by the Hon. Paul J. McCormick, United States District Judge for the Southern District of California, while he was in the State of New York and not within the State of California, and while the said Judge was not sitting or acting as a court or judge of the United States District Court for the Southern District of California, or of any other United States District Court (R. 408-409). The findings of fact, conclusions of law and decree entered in this cause were presented by the United States District Attorney for the Southern District of California to a Judge of the United States Court for said District in the State of New York, and in that state were signed by the Judge without the consent of the appellant.

It is obvious that the Judge of a District Court of the United States of one of the Districts in the State of California cannot act judicially in a case tried before

him in California when he is without the limits of that state. This is not the case of a judge of one district being assigned to sit in another district and there try cases, as provided for by Section 18 of the *Judicial Code*, which provides that:

> "Any designated and assigned judge who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, to decide all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; and his action thereon in writing filed with the clerk of the court where the trial or hearing was had shall be as valid as if such action had been taken by him within that district and within the period of his designation."

Nor is this case within the provisions of Sections 13, 14, 17 and 19 of the Judicial Code. When Judge McCormick made and signed the findings of fact, conclusions of law and decree in this cause, he was in New York sitting as a member of the Wickersham Law Enforcement Committee.

A court is a tribunal duly constituted and present at the time and place fixed by law for judicial investigation and determination of controversies. The court is not the judge and judges as individuals, but only when at the proper time and place they exercise judicial powers. Both time and place are essential constituents

of the organization of a court that is to say, in order to constitute a court the officer must be present at the time and place appointed by law.

In re Steele, 156 Fed. 854, 856
In re Steele, 161 Fed. 886

A Circuit Judge of the United States may rightfully dispose of any administrative matter in any circuit within his judicial circuit, which may be properly ordered at chambers, without personally going into its territorial limits, wherever his chambers may be for the time being, so long as they are held at any place within his judicial circuit.

Ex parte Harlan, 180 Fed. 128, 129
Horn v. Pierre Marquette R. R. Co., 151 Fed. 626
In re Parker, 131 U. S. 221, 33 L. Ed. 123

Congress has established in each of the states of the United States one or more judicial districts and has also divided the United States into judicial circuits. The boundaries of these districts and circuits are defined. Congress has also provided for the appointment of one or more district judges in each of such judicial districts. The jurisdiction of each of these district courts is coextensive with the boundaries of the judicial district in and for which it is established or created, and extends no further except in those cases where Congress has expressly extended it. The Judicial Code points out these cases. The district judges so appointed cannot act as such and exercise their judicial powers and functions outside their respective districts, except in those cases specially provided for by acts of Con-

gress, and these cases are pointed out in the Judicial Code.

Primos Chemical Co. v. Fulton Steel Corporation, 254 Fed. 454.

The instant case does not come within any of the exceptions or within the class of cases pointed out by the Judicial Code, in which a district judge can act outside of his district.

> "The district court of each judicial district sits within and for that district, and its jurisdiction, as a general rule, is bounded by its local limits."

Toland v. Sprague, 12 Peters 300, 328, L. Ed. 1093;

Devoe Mfg. Co., Petitioner, 108 U. S. 401, 27 L. Ed. 764;

Barrett v. United States, 169 U. S. 218, 221, 42 L. Ed. 723.

The making and signing of findings of fact, conclusions of law, and a decree is the exercise of a purely judicial function. It is the act of the court and not of a judge. The authorities agree upon the proposition that a judicial officer must exercise his judicial power within the territorial limits of his jurisdiction and that any attempted exercise thereof while without such territorial limits is, in the absence of an express provision of law authorizing the same, a nullity.

People v. Ruef, 114 Pac. 48 (Cal.);

Shepherd v. Superior Court, 54 Cal. App. 673, 202 Pac. 466;

Finkle v. Superior Court, 234 Pac. 432 (Cal.);

Eichoff v. Caldwell, 151 Pac. 860 (Okla.);
Dunlap v. Rumph, 143 Pac. 329 (Okla.);
Phillips v. Thralls, 26 Kan. 780;
Dunn v. Travis, 45 Kan. 541, 26 Pac. 247;
Price v. Bayliss, 131 Ind. 437, 31 N. E. 88;
Buchanan v. Jones, 12 Ga. 612;
In the Matter of Kings County, 78 N. Y. 383.

"A judge alone does not constitute a court. Proceedings at another time or place or in another manner than specified by law, though in the personal presence and under the direction of the judge, are coram non judice and void."

Ex Parte Gardner, 22 Nev. 280, 39 Pac. 570.

"The proceedings of a court at a time and place other than that prescribed by law are void. It is not the act of a court at all."

Johnston v. Hunter, 50 W. Va. 52, 40 S. E. 448;
White County Commissioners v. Gwin, 136 Ind. 562, 36 N. E. 237, 242.

"A court is a tribunal organized according to law and sitting at fixed times and places for the administration of justice, not an individual holding a judicial office."

People v. Village of Haverstraw, 151 N. Y. 75, 45 N. E. 384.

II.

SPECIFICATIONS OF ERROR No. 1, No. 2, No. 3, No. 4, No. 12, No. 13 and No. 14, Libelant's Evidence

All these specifications of error go to the insufficiency of the evidence and may be conveniently argued together.

The government only produced two witnesses who even claimed to have ever seen any liquor on the "Rethalulew." These were two foreign sailors named Eric Johnson and Walter Kruger, who were in the custody of the immigration officials for deportation for several months before their depositions were taken by the government. The testimony of Kruger and Johnson was to the effect that they were members of the crew of the motor schooner "Przemsyl," laden with liquor from Hamburg, Germany. The "Przemsyl" left Hamburg in August, 1927; reached Colon about the end of October, 1927; was taken to New Orleans and there turned over to the Prohibition Enforcement Bureau by its captain and mate in the hope of receiving informer's reward. In the spring of 1928 the "Przemsyl" and her cargo was released by the United States and thereupon she proceeded through the canal zone in the month of June, 1928, finally reaching a point on the California coast, forty miles off San Diego, about the first of July, 1928; that the "Przemsyl" stood off San Diego for about a month, and then moved to a point off San Pedro a distance of forty miles, where she arrived about the 1st of August, 1928; that the "Przemsyl"

stood off or drifted at this point for another month and then moved up the coast to a point about forty miles West of Santa Barbara, where according to the testimony of Kruger and Johnson the vessel drifted for the usual thirty day period. During all of this time the "Przemsyl" was accompanied by a large steamer of seven or eight thousand tons, flying the English flag, named the "L'Aquila," the two vessels being always but 200 or 300 yards apart while drifting on the ocean off the ports mentioned.

At these various stations off the Pacific Coast the two strange sailors, one a German—the other a Swede, first made contact, as they claim, with the respondent boat "Rethalulew" and a speed boat named or numbered A-1817, which was during the early part of August, 1928. According to the testimony of Kruger and Johnson, whenever the "Rethalulew" arrived the A-1817 was with her and both took liquor from the "Przemsyl." According to the witness Kruger, the "Rethalulew" made from fifteen to twenty-five trips to the "Przemsyl" and each time took from 300 to 500 cases of liquor from that boat and finally the "Rethalulew" was used, as they say, to transfer the remainder of the cargo of the "Przemsyl"—2000 cases of alcohol—to the "L'Aquila," and thereafter some time in the month of October, at which time the ships seemed to have parted company (R. 280-312).

The government also introduced a coast guard patrol book covering the months of August and September, 1928, Libelant's Exhibit No. 15, which is separately certified, pursuant to order and stipulation.

The government also put in evidence the incident of

the Coast Guard cutter 253 chasing a speed boat from the "Przemsyl" and "L'Aquila" on September 30, 1928, which speed boat could not be identified by any of the crew of the Coast Guard cutter, (R. 48, 59, 61-73) but it was conveniently identified by the two foreign sailors, Johnson and Kruger, after they had been in the custody of the immigration officials for deportation for several months.

Claimant's Evidence.

To support his case the claimant called as a witness one W. H. Evans, Superintendent of Fellows & Stewart Shipyard Company (R. 130-141), who testified that he was familiar with the respondent boat "Rethalulew" (R. 132), that the boat was on the ways of his shipyard, or in the water at his shipyard, until August 14, 1928, and at that time the engines had not been installed in the respondent vessel. Frank L. Morse, Sr., a marine engine builder (R. 147), who furnished supplies and materials and engine parts for the Rethalulew, and a mechanic to assist in the installation of the engines after the hull was finished (R. 148-149), testified that the work of installing the engines on the "Rethalulew" ran through August almost until the 1st of September, 1928 (R. 149-153); that he had trouble with the gasoline supply (R. 153); that three Liberty motors were installed on the "Rethalulew" after the completion of the hull by the shipbuilding company, which made the time required for the installation of engines longer than usual; that two of the engines were built in the Morse shop (R. 158) and the work of installation was done in Fellows & Stewart's shipyard at Wilmington (R.

158, 228-229). The last week in August they had trouble with the gasoline system; the engine would not turn over 800 revolutions (R. 163) and that with the gas trouble it would be impossible to go anywhere with the respondent boat (R. 163); that it was around the first of September, 1928, when the last payment for the gasoline pumps was made and Morse would not permit the "Rethalulew" to leave Fellows & Stewart's shipyard until they were paid for (R. 164). The witness further testified that the last payment made by Curwin for supplies and work on the engines of the "Rethalulew" was made on September 8, 1928, (R. 226). The witness Morse further testified, on redirect examination, that he began the work of installing the engines in the "Rethalulew" while she was still in the shed at Fellows & Stewart shipyard sometime around the middle of July, 1928, and that they did not finish the work necessary to make her a seagoing boat until almost September 1, 1928, (R. 228); that after launching, the boat did not go out on any cruises; that the witness was over at Fellows & Stewart's shipyard three or four times a week and the respondent boat was always there (R. 229); that his mechanic worked on the boat pretty steady until the middle of August, 1928; then they had trouble with the gasoline system and another of his mechanics went over to help remedy this defect sometime in the latter part of August, 1928; that the witness Morse was keeping close check on the boat during all of this time (R. 229-231).

Frank L. Morse, Jr., witness for the claimant, testified that he was a night watchman on the "Rethalulew" while she was in Fellows & Stewart's shipyard during

the month of July, 1928, until the middle or latter part of August, 1928; that he commenced sometime in July and was night watchman on the boat for six or seven weeks; that he was paid for his work a few days before Labor Day, September 3, 1928, and that that date was not very long after he got off the boat (R. 167-172).

The claimant and appellant testified in his own behalf that during the years 1928 and 1929 he was engaged in the real estate business at Pasadena and that previously he had been engaged in the automobile business and was identified with the Rancho Santa Fe project, as manager of the Pasadena office; that the Santa Fe project was being put in near Del Mar in San Diego County (R. 184-185); that he bought the "Rethalulew" on December 5, 1928, receiving a bill of sale from the only man who had ever owned her after she was built, and that he is still the owner of the "Rethalulew" (R. 186-187); that he first saw the "Rethalulew" on December 1, 1928, and negotiated for her purchase and made inquiries regarding her for a period of five days previous to the purchase; that he paid $9542 for the respondent boat and that it would cost him about $2800 to convert it into a boat of the cruiser type to carry prospective customers to and from the Rancho Santa Fe project (R. 187-189). That the payment was made in cash (R. 193); that at that time claimant had heard nothing as to the boat having been used for any illegitimate purpose (R. 191-197); that he asked the people at Garbutt & Walsh's what they knew about the respondent boat and was questioning everyone, trying to make sure that he was right in buying her (R. 203); that he had never heard of Tony Cornero or Anthony Strallo (R. 203);

that he had never heard of the "Przemsyl" or the "L'Aquila," and had never heard of the "Przemsyl" being libelled until on the trial of this cause (R. 205).

It will thus be seen that the government's case against the respondent boat rests wholly upon the testimony of the two vagrant sailors, Kruger and Johnson, then under arrest for deportation and afterwards deported, who testified that between August 1st and September 30th, 1928, the "Rethalulew" made twenty or twenty-five trips to the "Przemsyl" and that on each trip they loaded several hundred cases of liquor on the respondent boat; that the last trip was made on September 30, 1928, when they testify to the alleged transshipment of liquor from the "Przemsyl" to the "L'Aquila." To corroborate the statements of the two sailors, the government offered in evidence the patrol boat guard book (Libelant's Exhibit No. 15) and by entries made therein by witnesses not produced in court, sought to show that on different days in August the "Rethalulew" was not in the harbor, although the evidence of the witnesses Evans and Morse, which has not been contradicted, shows that at the time the guard book purports to show the supposed absence of the "Rethalulew" from the harbor, she was in fact tied up in Fellows & Stewart's shipyard. The government also offered in evidence, to corroborate the testimony of the two sailors, the testimony of two of the crew of the coast guard cutter 253, and the entries made in the guard book on September 30, 1928, to the effect that on that date they chased a speed boat from the "Przemsyl" and the "L'Aquila," but could not identify the boat. This evidence simply goes to the incident of September 30, 1928, and can

have no force in corroborating the statements of the sailors as to the "Rethalulew's" alleged visits to the "Przemsyl" prior thereto in the months of August and September, each time in company with another speed boat, the A-1817, which boat was also tied up in dry dock from the 9th of July to the 15th of September, 1928.

The Impossible Story Told by Kruger and Johnson as to the Alleged Transshipment of 2000 Cases of Alcohol by the "Rethalulew" from the "Przemsyl" to the "L'Aquila."

A short answer to the impossible story told by the two vagrant sailors as to the alleged transshipment of 2000 cases of alcohol is, that it bears upon its face the brand of its falsity. That is the kind of a story that would only go down with a landsman who had never served an apprenticeship at sea. The two veteran captains of the "Przemsyl" and the "L'Aquila" would never have engaged in such a marine farce forty miles from land on the Pacific Ocean in September, 1928. In order and then hoist the alcohol from the "Przemsyl" to the "L'Aquila," all they had to do was to lash the two ships together, a job of about thirty minutes duration, and then hoist the alcohol from the "Przemsyl" to the "L'Aquila" with the very same derricks they would have had to use in dropping the alcohol from the "Przemsyl" into the "Rethalulew" and then hoisting it from the "Rethalulew" on to the "L'Aquila." This could have been done in one-fifth the time it would have taken to

transship it by means of the "Rethalulew," as told by the fantastic imposters Johnson and Kruger. The two sailors were then under detention by the federal authorities, and their testimony was affected by fear or favor growing out of that detention.

> *Alford v. U. S.*, decided Feb. 24, 1931, Co-op. Advance Sheets, No. 9, 75 L. Ed. 368, 372.

Who can decide when the two sailors were telling the truth, or which one ever tells the truth? Assuming the aspect of the case most favorable to the Government, that they both testified to the first alleged appearance of the "Rethalulew" alongside the "Przemsyl" as being on the 1st of August, 1928, and that she kept coming continuously from that time to the end of September, 1928, they are flatly and indusputably contradicted on that point by the evidence of three disinterested witnesses and reputable business men, Evans and the two Morses; they are contradicted by the records of the Customs Office, which show the "Rethalulew" was not licensed until July 27, 1928, and not launched until July 30, 1928, and at that time the hull of the "Rethalulew" was not yet completed and the engines or motors had not been installed; that the "Rethalulew" was in Fellows & Stewart's shipyard, or in the water tied up to the shipyard, continuously until August 14, 1928; that the engines were not then installed and, therefore, it was impossible for the boat to have been out on the high seas; the testimony of Frank L. Morse, Sr., that his mechanic and another one worked on the "Rethalulew" two or three weeks after the vessel was turned over to the owner and while she was still in the shipyard, and the testi-

mony of the younger Morse that he was on the boat every night at least until as late as the middle of the month of August, 1928. According to the testimony of the two vagrant sailors, Johnson and Kruger, the "Rethalulew" was at the "Przemsyl" at least eight or ten times during the first two weeks in August, 1928, when by the uncontradicted and indisputable statement of Mr. Evans she was still in the Fellows & Stewart's shipyard until the 14th day of August, 1928, and not in a sea-going condition at that time because her engines had not then been installed. Who is telling the truth? Evans, a disinterested witness, Superintendent of Fellows & Stewart's shipyard, who built the boat, or the two vagrant sailors who gave their depositions after several months detention by the Immigration officials for deportation? What object had the Morses, father and son, to falsify for a stranger? Their testimony is worthy of full credence just as much as the testifmony of Mr. Evans. Can the testimony of Kruger and Johnson that the "Rethalulew" was at the "Przemsyl" time after time during the first two weeks in August, taking off liquor, be reconciled with the testimony of Evans and the two Morses? The testimony of the three witnesses, Evans, Morse, Sr., and young Morse, shows that it was an utter impossibility for the "Rethalulew" to have been out at sea during that period of time, between August 1st and August 14th, 1928. Thus no credence or weight can be given to the evidence of the two sailors as to the whereabouts of the "Rethalulew" during the first two weeks in August, 1928, and if they would lie about her whereabouts at that time they are not worthy of belief on any question

as to the number of times they saw the "Rethalulew" and what her activities were at the times they claimed to have seen her alongside the "Przemsyl." If the maxim, Falsus in Uno, Falsus in Omnibus, was ever applicable to any case or witness, or the testimony of any witness, then it is applicable to the testimony of the libelant's witnesses, Walter Kruger and Eric Johnson. The testimony of Evans alone should settle the question of where the "Rethalulew" was until August 14, 1928.

That Kruger's testimony is flat perjury is also conclusively proved by the witness W. E. Dresser (R. 173, 182). This evidence shows that Kruger did not know the name of the "Rethalulew" and had never seen or heard of such a speed boat until December, 1928. Dresser was a prohibition officer who took Kruger in charge on December 3, 1928, and had him in charge until December 9, 1928, inclusive, and during that time Kruger was being closely examined by Dresser to discover the names of the speed boats that had been out to the "Przemsyl." Dresser boarded the "Przemsyl" on December 3, 1928, and interviewed Kruger (R. 173-174), and Dresser then knew what the "Przemsyl" had been doing (R. 174). On December 3, 1928, Kruger told Dresser that speed boats had been out to the "Przemsyl," but did not mention the name "Rethalulew" (R. 174), although Dresser asked Kruger the names of the speed boats (R. 176). On December 9, 1928, Dresser conducted Kruger to various shipyards in Los Angeles Harbor and Long Beach Harbor, and showed him various boats which were docked there (R. 176). Before Dresser took Kruger out to search the shipyards

and comb the beaches, Dresser had asked Kruger the names of the speed boats that had visited the "Przemsyl"; Dresser also asked Kruger the names of the speed boats on December 5, 1928, and Kruger could not at that time tell him the names of the speed boats that had been out to the "Przemsyl" (R. 177-178). On December 9, 1928, after combing the shipyards from Long Beach to San Pedro, in company with Dresser, Kruger pointed out the "Rethalulew" as one of the boats that had been at the "Przemsyl." Previous to that time, December 9, 1928, Kruger had never mentioned the name of "Rethalulew" to Dresser at any time. The evidence on this point is very decisive, so we quote it verbatim:

"Q. Well, on the 5th of December did he tell you what boats he had seen out there?

A. He did not.

Q. Did he tell you on the 9th?

A. He pointed out a certain boat that he said he identified as one of the boats that had been at the "Przemsyl"

Q. What boat was that?

A. The "Rethalulew."

Q. Had he mentioned that name before?

A. I believe not.

Q. So, for the first time, you want to say that on the 9th of December was the first time that you had information from Kruger as to the "Rethalulew?"

A. *The first time he identified the boat, yes, sir.*" (R. 178).

Thus we have before us the testimony of Kruger, who swears he saw the "Rethalulew" fifteen to twenty times and each time helped to load her with a cargo of from

300 to 500 cases of liquor, and the testimony of Dresser, who says that Kruger never mentioned or told him the name "Rethalulew" until December 9, 1928, after she had been pointed out by Dresser. Then for the first time the name of "Rethalulew" got into the mind of Kruger. It is impossible that Kruger could have worked around the "Rethalulew" as long as he claims he did without knowing her name. It is an undisputed fact in the record that he name was painted on her stern in large letters. Had Kruger known the name of the "Rethalulew" prior to December 9, 1928, he would have immediately given it to Dresser in interviews he had with him previous to December 9th and then, in order to find the "Rethalulew," it would not have been necessary to search the coast and harbors from Long Beach to San Pedro. After Kruger had seen the "Rethalulew" in the harbor on December 9, 1928, that name easily dovetailed into his testimony given on June 5, 1929, Kruger not knowing the name of "Rethalulew" until months after the alleged transactions he testified to, cannot be believed in a single point of his testimony. Again we say, if the maxim, Falsus in Uno, Falsus in Omnibus, was ever applicable to any case or witness, or the testimony of any witness, then it is applicable to the testimony of the appellee's witnesses, Walter Kruger and Eric Johnson.

The Helen W. Martin, 108 Fed. 317;
Shecil v. United States, 226 Fed. 184.

SPECIFICATION OF ERROR No. 7.

The Admission in Evidence of the Coast Guard Patrol Book, Libelant's Exhibit 15.

To corroborate the decidedly unreliable testimony of Kruger and Johnson, the government introduced a coast guard patrol book covering the months of August and September, 1928, entries in which were in part made by a coast guardsman who was not within the Los Angeles district and, therefore, was not called to verify his entries (R. 253-254). This patrol guard book purports to show that the "Rethalulew" was not located by the patrol boat in the harbor at San Pedro on various days in August and September. The attempt of the government to prove the verity of the entries in the alleged patrol or guard book, or more properly speaking, the memoranda of the doings of the coast guard cutter engaged in harbor patrol at the Base in the months of August and September, was based on the testimony of a witness named Horace Anderson (R. 253-261). His evidence showed that he did not make any entries in the book; they were made, according to the witness Anderson, chiefly during that period of time by one B. N. Hansen (R. 254), and were not made by the witness Anderson. The witness Anderson did not come to the coast guard base at San Pedro until October, 1928 (R. 256), nor was he able to identify Hansen's writing but once out of eleven examples from said book (R. 257-258-259). This witness also testified that the guard book offered in evidence was not the only book of the harbor patrol and that there were others just exactly like it (R. 258). All the other entries not

made by Hansen in the guard book, offered in evidence for the purpose of attempting to prove the whereabouts of the "Rethalulew" on certain days in August and September, 1928, were made by a man named Irby, who was then at the Base in San Pedro, but was not called as a witness, although within the district, and by two other men, Tucker and Ellis, who were also in the Los Angeles district at the time of the hearing (R. 256, 275, 258), and who likewise were not called as witnesses.

This guard book, as evidence against the appellant, is the rankest kind of hearsay, and it is not a public record. It was nothing, more or less, than the self-serving declarations of the government made through its coast guardsmen, purporting to record the presence, or *absence,* from the harbor on certain days of boats that were registered at the Los Angeles Custom House. Not a modicum of evidence was given to prove its authenticity or what pains the guardsmen took in searching the harbor prior to making the entries; the entries were not made at the time of the search, but supposedly on the return of the patrol boat to the Base, and whether on that day or what day, we are left in utter ignorance and it may fairly be considered as a record based not upon facts, but upon the memories of sailors recording not what they had seen, but what they had not seen.

SPECIFICATIONS OF ERROR Nos. 8 AND 9

The Offer of the Testimony of the Witnesses L. H. Williams and Leonard Wood as to the Whereabouts of the Boat A-1817 During the Months of August and September, 1928, Should have Been Allowed and the Evidence Received and Considered by the Court.

On the hearing of this case, the claimant produced a witness named L. H. Williams, whose occupation was that of boatswain attached to Coast Guard Section 18, and was engaged in that occupation during the months of August and September, 1928. The witness was placed on the stand and duly sworn, and by him the claimant made the offer of proof found in Amendment to Assignment of Errors No. 9 (R. 406, 125), and in Specification of Error No. 9. The claimant also called to the stand a witness named Leonard Wood, whose occupation was that of billing clerk at the Los Angeles Shipyards during the months of July, August and September, 1928, and after the said witness was duly sworn, made the offer of proof found on page 120 of the Record, being Assignment of Error No. 8 (R. 397) and Specification of Error No. 8. The witnesses Kruger and Johnson have testified all through their depositions that the A-1817 came alongside the "Przemsyl," in company with the "Rethalulew," time and time again during the months of August and September, 1928, both boats being nearly always together; that both boats took a cargo from the "Przemsyl" each time they appeared

there together. The witness Kruger is very positive on this point (R. 315, 317, 321, 335, 336, 338, 345, 346, 347, 351).

The issuable fact in this case is, did the "Rethalulew" engage in the carrying of cargo from the "Przemsyl" in the months of August and September, 1928? The evidence on that point is very unreliable and conflicting. The principal fact sought to be established by the government in this case rests wholly upon the truthfulness of the witnesses Kruger and Johnson and the credibility to be given to their evidence. If it was impossible for the A-1817 to be at the "Przemsyl" taking on cargo when Kruger and Johnson say she did, sometimes in company with the "Rethalulew," and sometimes alone, in the month of August and up to the 15th day of September, 1928, that is a relevant fact which the claimant was entitled to prove, as it directly contradicted the witnesses Kruger and Johnson as to the transactions to which they have testified, and also established that their testimony was not reliable. Kruger and Johnson could not be telling the truth about the whereabouts of the "Rethalulew" if they were lying about the whereabouts of the A-1817 at exactly the same time, as their testimony linked the two boats together at innumerable times during the period covered by the transactions they have testified to. If the A-1817 was not at the "Przemsyl" and could not have been there, either alone or in company with the "Rethalulew," during the period of time from July 9th to September 15th, 1928, then the witnesses Kruger and Johnson were not simply mistaken, but they were deliberately falsifying. If they were falsifying as to the alleged presence of the A-1817 at

the "Przemsyl" in mid ocean at a time when, in fact, the A-1817 was in the dry dock of the Los Angeles Shipyards, why would they not falsify as to the alleged presence and activities of the "Rethalulew" during the same period of time? Their testimony links the two boats indissolubly together as engaged in one and the same transaction, and the claimant was entitled to show that at least half of the transaction could not have occurred, for if half of a transaction, as testified to by the witnesses, did not take place, it is an almost irresistible conclusion that the other half did not. It is a well established rule of evidence that where there is such logical connection between the fact offered as evidence and the issuable fact, that proof of the former tends to make the latter more probable or improbable, the testimony offered is relevant if not too remote. We submit that the following cases sustain our position and that this Honorable Court, in deciding this case, should consider the offered evidence of the witnesses Leonard Wood and L. H. Williams, appearing on pages 120, 121 and 125 of the Record.

> "It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of fact in controversy, it should be admitted. It would be a narrow rule and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact."
>
> *Home Ins. Co. v. Weide,* 11 Wall. 438, 439, 20 L. Ed. 198.

"Evidence which conduces, though but slightly, to prove a fact in issue, or to repel a presumption

which might otherwise arise favorable to the opposite party, is admissible and in case of doubt the evidence should not be excluded."

Louisville Ry. Co. v. Ellerhorst, 110 U. S. 823.

"Where testimony is admitted tending to show facts claimed by the opposite party to have existed as part of the transaction with which the defendant is charged, *specific* facts may be proved *showing the contrary*. It tends to contradict the witnesses and to show that their testimony is not reliable."

Wentworth v. Eastern R. Co., 143 Mass. 248, 9 N. E. 563.
Ross v. Boston & Worcester R. Co., 6 Allen (Mass.) 8.
Carroll v. Harris, 186 N. Y. Supp. 539.
Loring v. Worcester Ry. Co., 131 Mass. 469.
2nd Jones Comm. on Evidence, Sec. 718, p. 1346.

"The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inference it may afford in reference to the litigated fact. It is enough if these may tend even in a slight degree to elucidate the inquiry or to assist, though remotely, to a determination probably founded on truth."

Holmes v. Goldsmith, 147 U. S. 150, 164, 37 Law Ed. 118;
Interstate Comm. Com. v. Baird, 194 U. S. 25, 44; 48 Law Ed. 860.
The Squanto, 13 Fed. (2nd) 548.

"In short, the rule as to relevancy expands to meet the exigencies of a particular case. Where the testimony upon a vital issue is contradictory

evidence of a collateral fact tending to show which statements are the more probable, reasonable or credible may be admitted in the discretion of the court."

Farmers Bank v. Przymus (Minn.) 200 N. W. 931.

"Where there is a conflict of testimony of witnesses, evidence is admissible of collateral facts which have a direct tendency to show that the testimony of one set of witnesses is more probable than that of the other."

Glassberg v. Olson, 89 Minn. 195 94 N. W. 554.
Phillips v. Mo., 91 Minn. 311, 97 N. W. 969.
Louisville Ry. Co. v. Ellerhorst, 129 Ky, 142, 110 S. W. 823.

"Likewise when the evidence is evenly balanced, evidence of collateral facts is admissible for the same reason."

Lewis, Cooper & Hancock v. Utah Consl., 10 Ida. 214,
Humphrey v. Monida Stage Co., 115 Minn. 18, 131 N. W. 498.

"Where there is a direct conflict in the evidence of witnesses relating to a material issue in the case, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue, is relevant evidence and proper for the consideration of the jury."

Shepherd v. Lincoln Traction Co., 79 Nebr, 834, 113 N. W. 627.
Bowers v. Pixley, 197 N. W. 418.

SPECIFICATIONS OF ERROR Nos. 10 AND 11.

The Claimant Is a Bona Fide Purchaser For a Valuable Consideration Without Notice.

The record in this case discloses that all of the evidence offered by the Government as to the alleged illegal activities of the "Rethalulew" ends on September 30, 1928, and the respondent vessel was not libelled by the Government until April 22, 1929. The Claimant purchased the "Rethalulew" on December 5, 1928. During all that time, a period of over six months, the Government made no sign, took no steps, and did nothing to indicate to the outside commercial world that it considered the "Rethalulew" as a boat engaged in any trade or business other than that for which she was licensed.

Claimant desired the boat for use, in good faith, in his real estate operations, and has fully explained the delay in putting the "Rethalulew" to such use. The claimant before and at the time of buying the "Rethalulew" made inquiries at the Customs Office as to the status of the boat, and found that there was nothing against her, no charges of any kind whatsoever; the claimant went to the Fellows & Stewart Shipyard Company, the builder of the "Rethalulew," and found that the boat had been built for one James H. Curwin, who was then the registered owner and had been paid for by Curwin in cash, that being the ordinary way and usual manner of the company in transacting such business. (R. 138). He found that Curwin, the man who was selling him the boat, was the registered owner and

the only owner the boat had ever had; that there were no liens of record against her. The Customs Officers gave the "Rethalulew" a clean bill of health and her license was still in full force and effect. The claimant also inquired of the Garbutt & Walsh Shipbuilding Company as to the "Rethalulew," her worth and status, and was told by those people, experienced in the ship business, that the "Rethalulew" was all right and a good buy. Claimant asked others around the harbor as to the "Rethalulew" and all of the answers to his inquiries were favorable. He paid the purchase price in cash—$9542.00—(42 dollars being expenses attendant to the transfer) receiving a bill of sale, which he recorded at the proper office, and a license was duly issued to him by the proper officials of the United States Government in control of shipping at the Port of San Pedro —the very persons who would or should have known if there were any rumors afloat as to any alleged illegal doings of the "Rethalulew."

The claimant made all of the inquiries required by the law to protect him in his purchase. All answers to his inquiries were favorable to the purchase and showed that the boat had a clean record. If there were any facts of public knowledge inimical to the reputation or legal status of the "Rethalulew" on or before December 5, 1928, why did the Government stand by and neglect to bring libel proceedings against the boat until April 22, 1929? If the Government was *not* cognizant of any suspicious facts or circumstances concerning the "Rethalulew" on December 5th, 1928, how could any further inquiries on the part of the claimant have disclosed any? There were no liens endorsed on her cer-

tificate of enrollment or license, and nothing in the way of notice, either actual or constructive, of the Government's claim, which was not made until five months later.

The claimant had been actively engaged for seven years in the automobile business and when he had inquired at the source of title and found that the "Rethalulew" had only had one owner, that he had a good title and was then offering her for sale; and the Government officials, whose registration of the vessel was the only thing that could make the boat of any value to the claimant, ready and willing to issue a new license to claimant as its owner, they not knowing of any facts or circumstances that would have precluded them from issuing a new license and the claimant given a proper muniment of title by the seller, the rights of the claimant are protected from a future attack upon him by the Government, whose officials should have known and would have known of any charges made against the boat by the Government, or any defects in its title, by the law as laid down in the following cases:

> "Courts of admiralty are chancery courts for the seas and disposition of marine demands against vessels on principles of equity. Outstanding claims should not be enforced to the embarrassment of commerce and subsequent bona fide purchasers of vessels.
>
> *The Favorite,* 8 Fed. Cases #4696.
> *The Sarah Ann,* Fed. Cases #12342.
>
> "The rights of a subsequent bona fide purchaser for value, without notice, will always be recognized,

especially if the libelant has notice of the sale. A tacit right of forfeiture is lost or will be deemed waived by unreasonable delay in enforcing it. It will not be upheld in prejudice of an innocent purchaser for value, without notice, in favor of a libelant who seels to enforce it inequitably."

The Bolivar, 3 Fed. Cases 1609.

"The essential elements that make a bona fide purchaser are a valuable consideration, the absence of notice and the presence of good faith."

Houston Oil Co. of Tex. vs. Wilhelm, 182 Fed. 474, 477; 104 C. C. A. 618.

"To entitle a defendant to protection as a bona fide purchaser, and without notice of liens which had been previously conveyed by the grantor, he must allege and prove not only want of notice but also actual payment of the purchase money independently of the recitals in his deed which do not constitute proof of such payment."

Johnson v. Ga. Land & Trust Co., 141 Fed. 597, 72 C. C. A. 639.

"If a second purchaser for value and without notice purchases from a first purchaser, who is charged with notice, he thereby becomes a 'bona fide purchaser' and is entitled to protection."

Coombs v. Aborn, 68 Atl. 817, 29 R. I. 40; 14 L. R. A. (N. S.) 1248.

"Three months may render a claim stale, and bar the libelant from enforcing his or its rights as where the libelant has stood by and permitted the

ship to pass into the hands of an innocent purchaser, while perhaps three years would not be sufficient without change of ownership."

Coburn v. Factors & Traders Co., 20 Fed. 644, 647.

"Admiralty denies the privilege of enforcing a right of forfeiture which has been suffered to lie dormant without excuse until the rights of innocent third purchasers have intervened and would be prejudiced if it should be recognized."

The Bristol, 20 Fed. 800.
The Lyndhurst, 48 Fed. 840.
The Nikita, 62 Fed. 936, 10 C. C. A. 674.

We insist that the claimant has shown bona fidas, the payment of a valuable consideration, a total lack of notice of any claim or demand of the Government or any other person against the "Rethalulew" at the time of his purchase, or afterwards, until this libel was brought.

III.

SPECIFICATIONS OF ERROR No. 6 AND No. 15.

By these specifications of error is challenged conclusion of law No. 2, made by the Commissioner (R. 377) and conclusion of law No. 1, made by the Court (R. 389), said conclusions of law being that the Triple Gas Screw Motor Boat "Rethalulew," Official No. 227860, was fraudulently registered in violation of Title 46, U. S. C. Section 60, the said conclusions of law being wholly unsupported by the evidence, and are

founded upon a presumption unsupported by any fact from which such a presumption could be inferred, and such conclusions are made in the teeth of the statute upon which they are supposed to be based. The court by its finding of fact No. 8 (R. 388) finds, that at the time the respondent vessel was enrolled and licensed on July 30, 1928, in the United States Custom House at San Pedro, California, that such enrollment and licensing was fraudulent, in that at said time and place the owner and master, knowing that the respondent vessel "Rethalulew" was not to be used exclusively for pleasure and that said motor boat was to be used in trade, knowingly and fraudulently represented that the said motor boat "Rethalulew" would be used exclusively for pleasure and would not be used in trade, and the Commissioner made a finding on the same subject, that the short period of time elapsing between the date of registration of the vessel and the alleged violations of her registry, gives rise to the presumption that the owner and master knew at the time of registration that the vessel was to be used for a purpose other than that for which she was registered (R. 377).

We thus have the case of a vessel being forfeited on a presumption of a fraudulent intention, of which there is no evilence in the record. There is not a syllable of evidence in this record, other than the uncorroborated evidence of the two foreign sailors, that the "Rethalulew" engaged in any trade prior to September 30, 1928.

To sustain a forfeiture under the statute in question, 46 U. S. C., Sec. 60, the vessel for whom such enrollment or license is knowingly and fraudulently obtained,

must be a vessel not at that time entitled to the license or enrollment, and the party procuring the license or enrollment must have concealed from the government authorities facts existing at the time, and not something that might happen in the future, in order to make the obtaining of the license or enrollment of the vessel knowing and fraudulent; and the intention must have existed in the minds of the master and owner at the time they obtained the license. A presumption cannot be founded upon disputed facts. The evidence of two vagrant perjurers, and a finding thereon by a court, do not make that evidence undeniable truth. A fact from which a presumption of fact is sought to be drawn must be a fact undeniable in itself, and not one that is disputed or disputable. There are no statutory presumptions in this case, such as there is in the Narcotics Law, that when evidence, however flimsy, is given of an assumed fact, that it is then encumbent upon the defendant to prove the falsity of that fact in order to escape conviction. But by the conclusions of law made by the Commissioner and the Court in this case, they have imported into this case a *statutory presumption* of guilty and fraudulent knowledge, not found in the statute, on the part of the master and owner of the "Rethalulew" at the time of the licensing of the vessel, upon only a modicum of evidence, in itself unreliable, as to what use the boat was put to some thirty or sixty days after its being licensed and enrolled.

In law, every man is presumed to act in the ordinary affairs of life honestly and in good faith, and not fraudulently, and there is no such thing in law as a presumption that a man acted fraudulently on a certain

date in the past, when the presumption is drawn from acts done in the future, even though those acts be indisputably proved. In other words, you cannot make a presumption of fact walk backwards.

Under the statute involved in this case, fraudulent intent must have existed in the minds of the applicants at the time the license was obtained, and it cannot be presumed on disputed facts claimed to have occurred two months later that such application was knowingly and fraudulently made when the license was obtained. As we have before stated, a presumption must be based upon a fact existing at the time the presumption is made to take effect.

> "A presumption is an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known."
> *Home Ins. Co. v. Weide,* 11 Wall. 438, 442.
> *Ezzard v. United States,* 7 Fed. (2d) 808, (8 C. C. A.)

It is not sufficient to presume an intent, nor to presume that because no cargo was ever entered at a port of entry by that ship, that the offense of violating the vessel's license and enrollment has been committed.

> *Keck v. United States,* 172 U. S. 434, 43 L. Ed. 505, 509.

Presumptions are in general, classed as conclusive and disputable, and regardless of the class to which they belong, are rules of law, or more particularly, rules of evidence. They are indulged in by a process of artificial reasoning known as conclusions of law, and arise from the doctrine of possibilities. The *future* is

measured and weighed by the *past, not the past by the future happening.* What has *happened in the past,* under the same conditions, will probably *happen in the future,* and ordinary and probable *results* are presumed to take place *in the future* until the contrary is shown.

Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020.

Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137, 138.

An act which in itself is lawful and innocent is never presumed to be fraudulent, and the burden rests on the party assailing it to prove it. Fraud cannot be inferred by the court from acts legal in themselves, and consistent with an honest purpose. In all proceedings instituted to forfeit property, to recover moneys, or to set aside and annul deeds or contracts or other written instruments, on the ground of alleged fraud practiced by a defendant upon a plaintiff, the rule is of long standing and is of universal application, that the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory. It may be circumstantial, but it must be persuasive. A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud, and will not sustain a judgment based on such finding.

Budd v. Commissioner on Internal Revenue, 43 Fed. (2d) 509, 512, (C. C. A. 3);

Lalone vs. United States, 164 U. S. 255, 257, 41 L. Ed. 425;

Foster vs. McAlester, 114 Fed. 145, 149, 152 (C. C. A. 3).

SPECIFICATIONS OF ERROR No. 5, No. 15, No. 16, No. 17, No. 18, No. 19 AND No. 20.

A. E. 5, R. 377; A. E. 17, A. E. 24, A. E. 25, A. E. 26, A. E. 27, R. 402; A. E. 28, A. E. 29, R. 43. These specifications all go to the point that the Commissioner and the Court erred in making their conclusions of law, and each of them, in finding the issues against the libelant, and that the decree is contrary to law. The findings of the Commissioner and the Court on this point are that the respondent vessel "Rethalulew" "engaged in trade in violation of her license," contrary to the provisions of 46 U. S. C. A., Sec. 325. This raises the question as to whether, assuming as true the improbable story that the respondent vessel transhipped 2000 cases of alcohol from a ship flying the German flag to a ship flying the English flag, on the high seas, more than forty miles from the coast line of the United States, such transshipment being over a distance of only 200 or 300 yards in mid ocean, was engaging in trade? There is no evidence that the respondent vessel ever received one nickel for transshipping those 2000 cases, assuming it to be true that such transshipment was made. Trade is an occupation carried on for gain, not for charity. True, the "Rethalulew" was licensed as a pleasure yacht, but what Solomon in all the ages has ever been able to define what pleasure is? There is not a syllable of evidence that there was any trading done. The evidence is that they carried liquor from the "Przemsyl" to the "L'Aquila," but not even the vagrant sailors had the hardihood to say that they carried liquor, or any other goods or commodities, from the "L'Aquila"

to the "Przemsyl." There was no compensation paid, no trading done, no exchange of goods; they were on the high seas outside of the territorial jurisdiction of the United States and twenty-eight miles outside of the twelve mile liquor limit that has been extended to the United States by the grace of Wayne B. Wheeler and the King of Great Britain.

The Construction of the Statute, 46 U. S. C. A., Section 325.

The words of the statute, that is criminal in effect, are not to be twisted to suit the whims of the prosecuting officers of the Prohibition Enforcement Bureau, and when Congress passed that Act (Section 325) and used the words "in any other trade than for which she is licensed," they used the word "trade" in the common legal acceptation of the term as laid down by the decisions of the courts at that time and since. This statute is the Act of February 18, 1793, passed shortly after the adoption of the Constitution, in which the same word is used, and the word "trade" as used in 46 U. S. C. A., Section 325, and in the Constitution of the United States, has been construed by some of the greatest lawyers that ever sat on the Supreme Court of the United States.

46 *U. S. C. A.*, Section 325, under which the forfeiture has been declared, provides in part:

> "Whenever *any licensed vessel . . . . is employed in any other trade* than that for which *she is licensed* . . . . such vessel with her tackle, apparel, furniture and the cargo found on board her shall be forfeited."

There are two elements to an offense under this particular part of this statute; first, the vessel must have an existing license, and second, the vessel while licensed must be employed in a trade other than that for which she is licensed. This is a penal statute and is, therefore, not to be construed so as to include cases other than those which clearly appear to have been intended by the legislature and are fairly included in the language used to express such intention, however much they may appear to be within the reason, or what is called the equity of it.

United States v. Hamilton, 26 Fed. Cas. No. 15289;
Crooks v. Harrelson, U. S. Sup. Court Advance Opinions for 1930, No. 2, pp. 50, 53, L. Ed. Decided Nov. 24, 1930.

The power of Congress to regulate the enrollment and licensing of ships and vessels engaged in the coastwise trade under the Act of Congress heretofore cited is derived from the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, which gives Congress power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

Gibbons v. Ogden, 9 Wheat. 1; 6 L. Ed. 23;
Lottawanna, 21 Wall. 558, 577; 22 L. Ed. 654;
Sinnot v. Davenport, 22 How. 227, 240; 16 L. Ed. 243;
Hayes v. Pac. Mail Steamship Co., 17 How. 596, 597; 15 L. Ed. 254;
Smith v. Maryland, 18 How. 71, 74; 15 L. Ed. 269;
Moran v. New Orleans, 112 U. S. 69, 71; 28 L. Ed. 652;

Morgan v. Parham, 16 Wall, 471; 21 L. Ed. 303;
Transportation Co. v. Wheeling, 99 U. S. 273; 25 L. Ed. 412;
Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; 27 L. Ed. 419;
Gloucester Ferry Co. v. Pa. 114 U. S. 196, 210; 29 L. Ed. 158;
Old Dominion Steamship Co. v. Virginia, 198 U. S. 299, 307; 49 L. Ed. 1059;
Hnss v. New York & Porto Rico Steamship Co., 182 U. S. 393; 45 L. Ed. 1146;
Henderson v. New York, 92 U. S. 270, 23 L. Ed. 543, 548;
North River Steamboat Co. v. Livingston, 3 Cow. 713;
New York v. Independent Steamship Co., 22 Fed. 801.

The word "commerce" as used in the Commerce Clause of the Constitution comprehends not merely traffic but intercourse for the purposes of trade in any and all of its forms, including within these terms transportation and transit. Such transportation and transit embraces the transportation and transit of persons and property by land or by water and navigation.

Gibbons v. Ogden, supra;
County of Mobile v. Kimball, 102 U. S. 691, 702; 25 L. Ed. 238;
McCall v. California, 136 U. S., 104;
Gloucester Ferry Co. v. Pa., supra.

The term "trade" as used in the Navigation Laws being included within the term "commerce" means the trade and commercial intercourse between one destina-

tion and another with navigation as the means of transportation.

> *Henderson v. New York*, 92 U. S. 270, 23 L. Ed. 543, 548.

In the case of *Gibbons v. Ogden*, supra, Mr. Chief Justice Marshall said at page 68:

> "Commerce, undoubtedly, is traffic but it is something more; it is intercourse. It describes the commercial intercourse between nations in all its branches and is regulated by prescribing rules for carrying on that intercourse. . . .
>
> "If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation."

And on page 69:

> "They never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. . . .
>
> "The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

"To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes."

"It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend."

On page 70:

"This principle is, if possible, still more clear when applied to commerce among the several states. They either join each other in which case they are separated by a mathematical line, or they are remote from each other in which case other states lie between them. What is "commerce" among them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse between two states remote from each other, must it not commence in one, terminate in the other and probably pass through a third? . . . . The power of Congress then comprehends navigation within the limits of every state in the Union; so far as that navigation may be, in any manner connected with 'commerce with foreign nations, or among the several states or with the Indian Tribes.'"

On page 74:

"The word 'license' means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if

granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license.

"The coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted, that a voyage from New Jersey to New York is one of those operations.

"If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive argument, to prove that the construction is correct; and, if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hide. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of a cargo * * *."

In the case of *Henderson v. New York*, 23 L. Ed. 543, at 548, the court said:

"Commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments. It means trade and it means intercourse. It means commercial intercourse between nations and parts of nations in

all its branches. It includes navigation as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted."

In the case of *Wiggins Ferry Co. v. East St. Louis,* 27 L. Ed. 419, at 424, the court said:

> "The power of Congress to require vessels to be enrolled and licensed is derived from the provision of the Constitution which authorizes it to regulate commerce with foreign nations and between the several states."

In the case of *Sinnott v. Davenport,* 22 How. 227, 16 L. Ed. 243, at p. 247, the court said:

> "The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. * * *
>
> "The power of Congress, however, over the subject does not extend further than the regulation of commerce with foreign nations and among the several states."

In the case of *Huss v. New York and Porto Rico Steamship Co.,* 182 U. S. 392, 45 L. Ed. 1146, at 1151, the court said:

> "The use of the words "coasting trade" indicates very clearly that the words were intended to include the domestic trade of the United States upon other than interior waters."

The primary meanning of the word "trade" as used in the navigation laws of the United States means, therefore, that the vehicle or vessel employed in the trade must be used as the means of transportation or navigation of persons or property from one point within the United States to another point within the United States or to a foreign country, for hire.

The Alex Clark, 294 Fed. 905;
United States v. Canal Boat, Ohio, 9 Phila. 448, 460, 269 Fed. 691.

The Willie G., Fed. Cas. No. 17762, where the court said:

> "The use of the words 'coasting trade' indicates nation was had under this section are cases where the vessel had been employed as a carrier of merchandise in the expectation of profit in the usual and ordinary course of navigation."

The Nymph, Fed. Cas. No. 10388.

The power to regulate the licensing of vessels being based upon the commerce clause of the Constitution, the word "trade" as used in the statutes can not be broader than the term "commerce." The term "commerce" as used in that clause in respect to navigation and shipping means, as the above cited cases point out, commerce or commercial intercourse by navigation, and commerce or trade must, therefore, involve the transportation of persons or property by means of navigation of ships or vessels from one point to another.

Conclusion

Wherefore, appellant prays that this court enter judgment herein for the appellant, or that the judgment of the trial court be reversed and the case remanded for a new trial, and for such other and further relief as to the court shall seem proper in the premises.

OTTO CHRISTENSEN,

Attorney for Appellant.

No. 6352.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Ward Daniels, Claimant of the Gas Screw Vessel Rethaluleu,
Appellant.

vs.

United States of America,
Appellee.

BRIEF OF APPELLEE.

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No. 6352.

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vs.

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Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Claimant herein has been twice ruled against in the lower courts. The matter was presented to a Commissioner and thereafter, upon exceptions, to the United States District Court. Both courts announced in favor of the Libelant.

Libelant, on April 22, 1929, filed its libel of information against the Triple Gas Screw Motor Boat Rethaluleu, official number 227860, alleging violations of sections 4377 R. S. (Title 46 U. S. C. A., section 325) and 4189 R. S. (Title 46 U. S. C. A. section 60).

After joinder of issue counsel for the Libelant and counsel for the Respondent and Claimant entered into a written stipulation [Tr. 21].

> "IT IS HEREBY STIPULATED by and between Samuel W. McNabb, United States Attorney for the Southern District of California, and Emmett E. Doherty, Assistant United States Attorney for said District, Proctors for the Libelant, and Otto Christensen, Proctor for Respondent, that an order be entered by the Court referring the trial of this cause to David B. Head, Commissioner, and that the said Commissioner shall have authority to take testimony, to continue the trial from day to day, to make findings of fact and make a report therein.
>
> "IT IS FURTHER STIPULATED that the Commissioner's fee for hearing this cause shall be paid by the Respondent."

and it was by the Court so ordered.

Thereafter Libelant amended the libel by adding three additional causes of action.

On May 27, 1930, the cause came on for hearing before the Commissioner pursuant to the stipulation and order of Referee.

Libelant at the hearing introduced evidence on all of the causes of action pleaded but because the Commissioner and the Court, upon review, held that the Rethaluleu was forfeited by reason of the violation of Title 46 U. S. C. A., section 325 (4377 R. S.), and Title 46 U. S. C. A., section 60 (4189 R. S.), as pleaded in the original libel, it is only necessary in this argument to refer to the two statutes.

Title 46, U. S. C. A., section 325 (4377 R. S.) reads as follows:

> "Penalty for violation of license. Whenever any licensed vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen of and resident within the United States, or is employed in any other trade than that for which she is licensed, or is found with a forged or altered license, or one granted for any other vessel, such vessel with her tackle, apparel, and furniture, and the cargo, found on board her, shall be forfeited. But vessels which may be licensed for the mackerel fishery shall not incur such forfeiture by engaging in catching cod or fish of any other description whatever."

Title 46 U. S. C. A., section 60 (4189 R. S.) reads as follows:

> "Penalty for fraudulent registry. Whenever any certificate of registry, enrollment, or license, or other record or document granted in lieu thereof, to any vessel, is knowingly and fraudulently obtained or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, apparel, and furniture, shall be liable to forfeiture."

The Commissioner found that the Rethaluleu is a vessel of sixteen tons, powered with three Liberty motors, but because the remaining findings of fact and the conclusions of law have been set forth in full at pages 375 to 378 of the transcript, the record will not be further burdened by reiterating them.

Claimant filed exceptions to the report of the Commissioner, and they were presented to the Court and argued. On September 19, 1930, at Los Angeles, California, the Court overruled the exceptions and caused its minute order to be entered as set out at page 383 of the transcript, pages 6 and 7 of Appellant's brief.

At that time Honorable Paul J. McCormick, United States district judge, filed in writing his conclusions. After formally overruling and denying the exceptions and confirming the report and adopting its recommendations and ordering a decree of forfeiture, His Honor proceeded to state [Tr. 384]:

> "In amplification of the ruling confirming the Commissioner's report herein, it is sufficient to state that an examination of the evidence before the Commissioner reveals that assuming that the Commissioner erred in excluding proffered evidence as to the whereabouts of the speed boats, 'A-1817' and 'The Seal,' it was shown by sufficient and satisfactory evidence that the 'Rethaluleu' on and about September 30, 1928, engaged in a trade other than that for which she was registered and that said vessel was fraudulently registered. Such conclusion is supported not solely by the depositions of Kruger and Johnson, but is clearly inferable and proven by other independent facts and circumstances in the record. But it is not clear that the Commissioner erred in excluding the proffered evidence. The Commissioner ruled that the proffered matter was collateral to the issue before him and that at best the matter was offered as impeachment of the witnesses Kruger and Johnson, and being impeachment upon collateral matters, it was irrelevant and immaterial to the issue as to the "Rethaluleu." There is considerable strength in this position. But assuming error, it was not substantial or prejudicial because even if taken as refutation of the testimony of Johnson and Kruger as to any contact by 'The Seal' or 'A-1817' during July, August and until the middle of September, other independent and undisturbed evidence that the 'Rethaluleu' contacted with the 'Przemsyl' in the latter part of September, 1930, amply sustains the Commissioner's ruling that the libeled vessel was engaged in a trade for which she was not registered. The exceptions to the master's report are overruled, the report is confirmed, and a

decree in accordance therewith is ordered with costs to libelent."

The minute order of September 19, 1930, and the conclusions of the Court, filed the same date, were made and filed while Honorable Paul J. McCormick was within the Southern District of California. His Honor left the Southern District of California to sit, by assignment, as a United States district judge for the Southern District of New York before Libelant presented its proposed findings of fact and conclusions of law and decree.

The findings of fact and conclusions of law were prepared by counsel for the Libelant, and presented to counsel for the Claimant for his approval. Counsel for the Claimant endorsed on the proposed findings of fact and conclusions of law certain objections which appear on pages 410 and 411 of the transcript. Claimant did not include any suggestion to the Court that he then had the opinion or would ever contend that the Court was then without the power to sign findings, make conclusions and order its decree entered. The scope of the objections which counsel for Claimant presented to the decree shows that he had given the objections consideration and it is apparent that at that time he conceded that the judge who heard and overruled the objections to the Commissioner's report and ordered a decree pursuant to the Commissioner's report then had the authority to sign findings of fact and conclusions of law and render a decree pursuant to the order of September 19, 1930.

It seems reasonable to believe that if the action to be taken by Judge McCormick, and of which Claimant's coun-

sel was well aware, would be prejudicial or if any legal cause existed why the Court should not take the action of October 6, 1930, these matters would and in good conscience, should have been included in the objections forwarded to the Court. It was not until November 1, 1930, when Claimant filed his petition for appeal, that the first suggestion was made that the Court had erred in signing its findings and decree of October 6, 1930.

It is noted that in Claimant's objections, which accompanied the proposed findings of fact and conclusions of law and the proposed decree, that Claimant complained that the proposed decree and the proposed findings were at variance and materially different from the findings of fact and conclusions of law filed by the Commissioner and that the Respondent and Claimant objected to the Court making any further findings of fact or conclusions of law other than the conclusions of the Court filed on September 19, 1930.

The report of the Commissioner and the order of the Court, confirming it, and ordering a decree pursuant thereto would doubtless be sufficient to constitute a valid judgment and decree except that on June 2, 1930, the United States Supreme Court amended the Rules of Practice in Admiralty by adding a new rule, numbered 46½, reading as follows:

> "In deciding cases of admiralty and maritime jurisdiction the Court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if appeal is taken from the decree, shall be included by the clerk in the record which is certified to the Appellate Court under Rule 49."

This new rule became effective October 1, 1930.

Prior to September 19, 1930, and after August 27, 1930, the Claimant had filed his exceptions to the Commissioner's report. These exceptions were filed with the clerk on September 2, 1930, and between September 2, 1930, and September 19, 1930, had been fully presented, argued and submitted to the Court for its ruling. After September 19, 1930, there remained nothing for the Court to do except the *pro forma* act in accordance with the newly promulgated admiralty rule. The acts of the Court of October 6, 1930, were purely ministerial. The conclusions of the Court had been entered in the Southern District of California so that nothing remained for Libelant to do but follow the order of September 19, 1930, and draft findings, conclusions and decree in accordance with the Commissioner's report. If Claimant suffered any detriment he had suffered it prior to October 6, 1930, and he did not suffer by reason of the formal action of that date.

Authority to Sign Findings and the Decree of October 6, 1930.

Claimant lays great stress upon his allegation that Honorable Paul J. McCormick, United States district judge, who made the reference and heard the exceptions to the findings of the Commissioner was without power to sign the findings and decree pursuant to his order and conclusions of September 19, 1930. In his exuberance on this point counsel falls into error. We feel that he is relying too much on newspaper accounts.

This Court will notice the public acts of the Chief Executive to the Nation and from such observation is

informed that the President of the United States, in the consideration of problems in the administration of the laws of the United States, assembled a conference of men experienced in the administration of law and named a commission known as the National Commission on Law Observance and Enforcement. He selected from the state of California Honorable Paul J. McCormick, United States district judge. The duties he assumed under this appointment were not inconsistent with the duties and responsibilities of his official position as district judge.

Counsel has declared that Judge McCormick was absent from his home district on October 6, 1930, sitting as a member of what counsel styles the "Wickersham Commission." Counsel for the Libelant knows of no such Commission. The record of the United States District Court for the Southern District of New York is the best answer to Claimant's statement. Inasmuch as Claimant deviated from the record in this case, to answer his contention, we likewise deviate and show that the circumstance which he contends to be controlling is not necessarily so. For this reason we quote in full the certified copy of the order of Chief Justice Hughes designating His Honor, Paul J. McCormick, one of the judges of the Southern District of California, to sit in the Southern District of New York from October 1, 1930, to December 31, 1930:

"DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER CIRCUIT.

The Senior Circuit Judge of the Second Circuit having certified that by reason of the accumulation and urgency of business in the District Court for the Southern District of New York in the Second Circuit, the district judges of said district are unable to per-

form speedily the work of said district, and that he (the said Senior Circuit Judge) has found it impracticable to designate and assign a sufficient number of district judges of other districts within the Second Circuit to relieve the said accumulation of urgency of business; and the Acting Senior Circuit Judge of the Ninth Circuit having consented to the designation and assignment of the Hon. Paul J. McCormick, United States District Judge for the Southern District of California in the Ninth Circuit, to hold the District Court for the Southern District of New York during the period beginning October 1st, 1930, and ending December 31st, 1930, now, therefore, pursuant to the authority vested in me by Title 28, Section 17, of the Code of Laws of the United States of America, inasmuch as in my judgment the public interest so requires,* and it appearing to be impracticable to designate and assign a district judge of a circuit adjoining the Second Circuit for such service, I do hereby designate and assign the said Hon. Paul J. McCormick to perform the duties of district judge and hold a district court in the Southern District of New York within the Second Circuit, during the period beginning October 1st, 1930, and ending December 31st, 1930, and for such further time as may be required to complete unfinished business.

CHARLES E. HUGHES
Chief Justice of the United States.

Dated, Washington, D. C., September 20th, 1930.

*This clause to be lined out where designation is from adjoining circuit.

(Seal of the District Court of the United States, Southern District of New York.)

A true copy.

CHARLES WEISER,
Clerk."

The fact is, of course, that Judge McCormick was sitting in the Southern District of New York and serving as a

member of this Honorable Commission at the same time. Neither duty prohibited him from acting herein.

If there was any merit in this contention of Claimant the question has not been properly preserved for review for we find that Rose on Federal Jurisdiction and Procedure, Third Edition, at page 347 in speaking of objections to jurisdiction says that the question may be suggested by the Court at any time during the course of the proceedings, but it must be raised in some distinct way so that the parties shall have opportunity to present evidence concerning it. If one of the parties seeks to raise the issue he must do so by some appropriate pleading.

Hartog v. Memory, 116 U. S. 588.

Scanning state court decisions on this question is of no assistance to ascertain the rule of the Federal system.

> "In legal phraseology the power of the court to hear and decide a case is termed 'jurisdiction,' * * * "
>
> 25 *Corpus Juris,* 886.

The general rule is that when the Court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities.

The District Court had the authority to make the reference, to review the Commissioner's Report, and make its order of September 19, 1930, affirming it, and it follows that the Court thereafter had the power and authority to perform the ministerial acts of October 6, 1930, in ascertaining whether counsel for the Libelant had followed the Court's order confirming the report and drafting findings and decree in accordance with the report of the Commissioner.

In *Toland v. Sprague,* 12 Peters 300 at page 330: (37 U. S.)

> "Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But that is not the case. The court had jurisdiction over the parties and the matter in dispute; the objection was, that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him; and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process *in personam.* Now, this was a personal privilege or exemption, which it was competent for the party to waive. * * *
>
> "It has, however, been contended, that although this is true, as a general proposition, yet the party can avail himself of the objection to the process in this case, because it appears from the record, that a rule was obtained by him to quash the attachment, which rule was afterwards discharged; thus showing, that the party sought to avail himself of the objection below, which the court refused. In the first place, it does not appear upon the record, what was the ground of the rule; but if it did, we could not look into it here, unless the party had placed the objection upon the record, in a regular plea; upon which, had the court given judgment against him, that judgment would have been examinable here. But in the form in which it was presented in the court below, we cannot act upon it in a court of error."

A district judge who has, pursuant to the order of the circuit judge, tried a case in another district has jurisdiction to pass upon a motion for a new trial therein after returning to his home district where the parties waive his return to the other district for the purpose of deciding the motion.

Cheesman v. Hart, 42 Fed. 98.

A district judge designated, under section 17 of the Judicial Code, to hold court in an adjacent district may make an order while without such district directing the drawing of a panel of petit jurors for the order is one which may be made at the chambers of the judge and in such case

> "* * * it is not necessary that it be made within the territorial limits of the district in which the order is to be effective, if it is made where the judge at the time is performing the duties of his office, as the judge's chambers are considered to be where he is, and authorized to be, engaged in performing his judicial duties."
>
> *Apgar v. United States,* 255 Fed. 16 at page 18.

Judge Deitrich in *Hicks v. United States Shipping Board Emergency Fleet Corporation,* 14 F. (2d) 316, states:

> "In the meantime the term during which the judgment was entered, as well as the period covered by designation, expired, and I returned to my home district. Notwithstanding these facts, it would seem that under section 5 of the Act of September 14, 1922 (42 Stat. 839 (Comp. St. §985)), I have the authority to entertain the petition, and standing rule 5 of the New York district the power continues notwithstanding a lapse of the term."

We find *in re* Neagle (39 Fed. 833 at p. 839) that all of the law of the United States is not specifically expressed in statutory enactments. Many powers are necessarily inherent in the various departments of the government, without which the government could not perform functions necessary to its existence. The exercise of such power is, nevertheless, in pursuance of the laws of the United States.

We find in Hallon Parker, petitioner (131 U. S. 221) that the chambers of the district judge of Washington Territory, who is also a judge of the Supreme Court of the Territory, may be held whilst he is in attendance upon the Supreme Court at the place where such court is sitting, although it be without the territorial limits of his district, and at such chambers he may receive notice of an appeal from a judgment rendered by him within his district. At page 225 the court states:

> "When the law allowed the proceeding to be taken at the chambers of the judge of the court, it meant at the chambers where he can conveniently attend to business relating to cases in his district, not that they must necessarily be within the territorial limits of his district. As one of the judges of the Territory, it is a part of his duty to sit in the Supreme Court. He is one of its members, and his chambers, whilst the Supreme Court is in session, and he is in attendance upon it, may be at the place where that court is sitting. Otherwise the right of appeal within the six months allowed by law would be abridged for the period for which notice is to be given."

In *Wheeler v. Taft,* Fifth Circuit, reported in 261 Fed. 978, we find that a writ of error to review a judgment granted by the judge "in chambers," which is considered to be where the judge is and is authorized to be engaged in performing his judicial duties, will not be dismissed because allowed in a division other than that in which is situated the county from which the action was removed.

It is important to note that Claimant's objection is first voiced in his assignment of error XXX concurrent with his petition for appeal addressed to Honorable John R. Hazel, United States District Judge, filed November 1, 1930. Is there any merit in this assignment of error, which must be

characterized as nebulous when we find that the petition for appeal of Claimant [Tr. 393] recites that:

> "* * * feeling aggrieved by the final decree of this court entered on the 27th day of October, 1930, hereby pray that an appeal may be allowed to them * * *"

instead of appealing from the decree signed by Judge McCormick on October 6, 1930.

The authority of the Court to act outside its home district was before the Fourth Circuit *in re American Home Furnishers' Corporation, Ross et al. v. Willcox et al.* (296 Fed. 605). At page 607 the Court says:

> "The chief question here is whether the district judge had the power at chambers in Parkersburg, where he was holding court under a special assignment provided by the Judicial Code, to entertain a petition to review the action of the referee in bankruptcy in ordering a sale of the property. The general rule is that a judge has no power to try cases, either in law or in equity, outside his own district. There is at least on implication in the federal Constitution and statutes that a party cannot be required to try his cause outside the territorial jurisdiction of the court in which it is pending. The judge, however, has at chambers the authority and power to make all interlocutory orders and to do everything that is necessary to speed the cause and promote justice to the parties, except the actual trial on the merits.
>
> "Even if this case were in a court of equity, instead of bankruptcy, the district judge could have granted the order at his chambers anywhere in the Eastern District of Virginia. The judicial Code, § 9 (R. S. § 576 (Comp. St. § 976)), provides:
>
> " 'The District Courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and

directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.'

"The same provisions are made in the first equity rule.

"The bankruptcy court is open at all times, and section 2 of the Bankruptcy Act (Comp. St. § 9586) invests the District Courts 'with such jurisdiction at law and in equity as well enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms.'

"The federal courts, it is true, must find their jurisdiction in express provisions of federal statutes; but in passing on the legality of the method of exercising the jurisdiction plainly conferred, the statutes should be liberally construed in support of every action of the judge looking to the prevention of delay and the promotion of justice. Sections 13 and 14 of the Judicial Code invest a district judge designated to hold court in another district with full judicial power in that district, but there is nothing in the statutes which gives the least intimation of an intention to take away or suspend any power with which he was invested relating to the business of his own district. No provision is made for another judge, while he is absent, to act in his district in making orders and decrees in bankruptcy matters and to perform other judicial duties. Nothing short of the clearest expression of legislative intention would justify the holding that the Congress intended to put in abeyance the exercise in any district of judicial power at chambers necessary to the promotion of justice because its judge was holding court in another district. We are of the opinion, therefore, that while a district judge is holding court

in another district under statutory authority, he has the power, in his discretion, to hear all matters that he could hear at chambers if he were in his own district; and that the order made by Judge Groner at Parkersburg was valid."

Evidence Introduced by the Libelant.

[Tr. 27].

Libelant's first witness was Carl O. Metcalf, clerk and acting deputy collector of customs in charge of marine documents, who identified the license of the Rethaluleu, Libelant's Exhibit No. 1; the owner's oath and the master's oath, Libelant's Exhibits No. 2 and 3. He stated that there was but one boat registered under the name of the Rethaluleu. He identified a certified copy of the license issued to Ward Daniels, Libelant's Exhibit No. 4. The new owner's oath and the master's oath (continuing McCluskey as master) were received and marked Libelant's Exhibits No. 5 and 6.

He testified on cross-examination that Libelant's Exhibit No. 4, the license for the Rethaluleu issued to Daniels, was issued of record in the customs house upon the recording of a bill of sale from Curwin to Daniels. A bill of sale was introduced and marked Claimant's Exhibit A. This is found on pages 369 to 374 of the transcript.

Libelant's next witness was Newell B. Ruggles. No finding was made as a result of his testimony so his evidence will not be stated.

Libelant next offered in evidence the depositions of Eric Olaf Johnson and Walter Krueger which had been taken on June 5, 1929, pursuant to stipulation, at which

time counsel for Claimant appeared. The depositions appear on pages 280, *et seq.* and 312 *et seq.* of the transcript.

Witness Kruger in his testimony referred to one Tony Cornero. In Kruger's testimony Cornero was placed in Hamburg, Germany at a spirits factory and shipping point. [Tr. 318, 319 and 320.] Cornero superintended the placing of the liquor cargo upon the Przemysl. He accompanied the boat from Hamburg, Germany, out to sea and left on the pilot boat. The Przemsyl came through the Panama Canal into the waters of the Pacific Ocean and off the coast of the state of California. There Cornero again contacted his cargo and the parties in charge of it. [Tr. 321, 322 and 323.]

Liquor was taken from the schooner Przemysl by speed boats and the Rethaluleu assisted in this transshipment. It carried from 300 to 500 cases a trip. [Tr. 317, 338, 340, 347 and 348.]

On September 30, 1928, the L'Aquila and the Przemysl were in contact by means of the Rethaluleu and cargoes of intoxicating liquor were transshipped from the Przemysl to the British ship L'Aquila. During the transshipment the Coast Guard Cutter No. 253 came on the scene. The L'Aquila hoisted a signal. The Rethaluleu came out from behind, where it could view the Coast Guard cutter, and put out to sea under full speed, using the British and German vessels as a protection and screen. The cutter pursued the Rethaluleu. After clearing the British and German ships it fired upon the Rethaluleu repeatedly. The Rethaluleu was by far the speedier boat and escaped apprehension at this time. The incident of this transshipment and chase on September 30, 1928, was duly entered upon the log of the Coast Guard vessel 253 which was introduced in evidence. [Tr. 64.]

The Objection to Admission of Log Books in Evidence

Vessels of the United States over certain tonnage are required to keep log books. The rules of the Life Saving and Revenue Service are made applicable to the United States Coast Guard by Title 14 U. S. C. A., section 38, and regulations of the Revenue Cutter Service (1907 Section 272) are regulations for the keeping of log books, Title 46 U. S. C. A., section 201 (R. S. 4292).

The Coast Guard vessel was thus required by law to keep its log book and having recorded therein the incident of September 30, 1928, mentioning specifically the foreign ships L'Aquila and Przemysl, the Commissioner did not err in admitting this evidence corroborative of the Libelant's deposition witnesses. The evidence is material, pertinent and valuable. It emphasizes the speed of the Rethaluleu and its ability to outdistance the Coast Guard cutter so easily.

Lore and Pavec of the Coast Guard crew were personally produced and related the chase and described the foreign boats. [Tr. 49, 62.] Pavec says the pursued boat was about 55 feet long [Tr. 51] and made 35 or 40 knots an hour. Lore had never before chased a boat as fast as this. [Tr. 75.] Kruger [Tr. 353] ties in the incident by describing the Coast Guard vessel by the "C. G." upon it.

The log of the Coast Guard Harbor Patrol Boat, also called the "Guard Book," under the same theory, was discussed [Tr. 80] and received in evidence [Tr. 254]. This evidence is corroborative of the log of the Coast Guard vessel 253 and of witnesses Kruger and Johnson.

because an examination of it shows that the Rethaluleu was not in the harbor on September 29th and 30th, or October 1, 1928. It dovetails the testimony of Kruger and Johnson as to the number of times the Rethaluleu was out at the Przemysl [Tr. 282 and 317] during August, September and October, 1928.

Deposition witness Kruger is corroborated by witness Dresser [Tr. 91] who found radio equipment aboard the Przemsyl December 3, 1928, and he found none on board in 1927 at New Orleans. Kruger testified [Tr. 318] that the Rethaluleu took a radio receiving and sending set to the Przemysl.

Johnson identified Johnny McCluskey [Tr. 284, 301 and 303]. He saw him on the Rethaluleu twenty or twenty-five times [Tr. 293]. Frank L. Morse recognized his picture [Tr. 166]. Homer H. Evans identified him [Tr. 140].

Evans [Tr. 140] also identified George Garvin as of the crew of the Rethaluleu. This is in accordance with the testimony of Johnson [Tr. 286, 304].

Miss Allman recognized Johnny's picture [Tr. 239] as the man who paid for the repairs on the Rethaluleu and charged the outboard motor to it after it had been seized by the United States Marshal. [Tr. 243.]

Kruger recognized Strallo, alias Cornero [Tr. 327], and George. [Tr. 327.] He identified Johnny McCluskey, also known as Red McCluskey. [Tr. 315 and 316.]

Evans knew McCluskey was master of the boat about the time it was finished. [Tr. 138.] It was licensed July 30, 1928.

The Rethaluleu was found by Boatswain Williams of the Coast Guard coming in from sea August 23, 1928. Johnny McCluskey was in charge. [Tr. 264.]

So we see that all the arguments based on the testimony of Morse, Sr., and Morse, Jr., are vain and ineffectual to controvert the testimony of Kruger, Johnson and Williams. The boat was at sea and used as and when she was needed.

The Przemysl loaded with liquor was off the Coast of California. The Rethaluleu was built to act as a contact boat for her and performed this function so well that at the time the Przemysl went into Ensenada there remained to be disposed of only about 100 cases of liquor. This was tossed into the sea.

Claimant as a Bona Fide Purchaser.

Counsel strenuously argues that Daniels did not know of the unlawful activities of his boat prior to purchase, but to no purpose when we read Claimant's own testimony in answer to his own counsel's questions. [Tr. 191.] From it we must infer his knowledge, as we can clearly read his attitude:

> "Q. Had you any information or did any one intimate to you that this boat which you were buying was a rum runner? A. Well, not that I know of. I wouldn't have paid any attention to it any way. All I asked was a clean bill of sale.
>
> Q. You wouldn't have bought a boat that you knew had been violating the law, would you? A. Really, to tell you the truth I would, as long as I had a clean bill of sale, I didn't care what the boat had done previous to that time if I had a bill of sale, because I didn't know what the boat had ever been used

for or anything else. All I asked was a bill of sale, and I wanted that bill of sale from the Customs Department, which I received."

On cross-examination [Tr. 193]:

"Q. Did Curwin tell you anything about why he wanted to sell the boat? A. Said he needed the money.

Q. Is that all he said? A. About all he said.

Q. Did he say he was in any particular hurry to sell the boat? A. He said he was in a hurry to sell it and was going to sell it in a hurry, and that is why he was putting the price on it which he had on it at that time.

Q. Did he tell you why he was in a hurry? A. No.

Q. Did you do any bargaining, or was that the first figure he placed, $9500? A. We did some bargaining.

Q. What did he ask for it first? A. I don't remember.

Q. Did you pay him cash or check? A. I gave him the cash. He requested it.

Q. He requested that you pay him in cash? A. Yes.

Q. Did you get suspicious of that? A. No, not at all, only to the extent that I said all I asked was just a clean bill of sale.

Q. What did you mean by 'clean bill of sale'? A. Why, that was my way of expressing a bill of sale that is absolutely spotless of anything against the boat."

Claimant Daniels did not recognize the picture of the master of his own boat [Tr. 200]:

"Q. Do you recognize this man here? (Indicating the deposition.)

Mr. Somers: Pointing to Exhibit 1 of the deposition.

A. I don't think so.

Q. Never saw him before? A. I don't think I ever did."

[Tr. 199]:

"Q. Why is it you kept McCluskey on as master of the boat? A. The man I hired wasn't McCluskey.

Q. Your license shows McCluskey as your master. A. The man I hired was McClumskey.

* * * * * * * *

Q. You are sure it wasn't John McCluskey? A. The one I hired is John McClumskey, and his name is on the bill of sale."

[Tr. 201]:

"Q. You saw the signature on the bill of sale? A. Yes.

Q. Will you find it for me? A. There is the signature right there. (Indicating.)

Q. This is the same fellow who went and signed the master's oath, I suppose, at the Customs House? A. Well, they said I had to have some one. I wasn't a licensed pilot.

Q. Did you know McClumskey's signature? A. No, I don't. I didn't know how long he would be with me at that time, just until I got it on the ways, which I thought would only be a matter of a couple of weeks."

Claimant is as indefinite regarding Curwin, "the mysterious stranger" and "the mysterious owner," of the Rethaluleu as he is concerning the man to whom, according to the evidence, he entrusted his $9500 alleged investment. [Tr. 202, 203.]

Earmarks of Illegality and Fraud.

The record in this case cannot be read without the question coming into an impartial mind as to the reason why all the witnesses are vague with respect to Curwin. The contract under which Fellows and Stewart built the boat in the first place was not signed before V. B. Stewart, member of the partnership, but was signed before Homer Evans, a subordinate. It was not witnessed as suggested by the form and a pertinent question is why was it not? The initial payment was made in cash and succeeding payments were in cash. No one at Fellow's and Stewart's Shipyards deemed it expedient or proper procedure to make a memorandum of the residence of J. H. Curwin or make any investigation of his financial ability. Hard money, it is said, bears no earmarks, but its invariable use in alleged ordinary business transactions becomes significant. "The mysterious stranger" paid cash for the boat and paid cash to Morse for the motors. Morse, of course, did not make any more of an investigation than Evans or Stewart did, nor was either able to give a more accurate description than that furnished by Daniels.

The weakness of Claimant's story of his investigation of the qualities of the Rethaluleu is shown by his testimony [Tr. 203]:

> "Q. Did you ask the people at Barbutt & Walsh what they knew about the boat? A. Yes, I was trying to question every one to make sure I was right. I was talking to a number of different ones. In fact, I believe I spoke to Mr. Evans but he doesn't remember that. He said this morning he had never seen me before. When I walked up to him, he didn't know who I was, and talked to him about that boat.

> In fact, when I went and talked to him I didn't know the name of the boat and I pointed it out and he told me it was a 'pip,' and I asked him how fast it was and he said he really didn't know, he thought about 40 miles an hour; and I am just saying that that is the only dope I had on the boat. I went to different ones; then one of the carpenters there, I talked to him, but I didn't talk to any one but one of any trade, because I was only after information for myself."

It appears from the record that Mr. Evans is the building superintendent at Fellows and Stewart and was not employed at Garbutt & Walsh.

Daniels, we remember, was the Pasadena agent of a real estate concern. He does not tell us that he was a director or that he had control of the policies of the Rancho Santa Fe project. He was a real estate salesman and prior thereto had been a salesman of automobiles. He had some familiarity with boats. He had previously owned two. He did not investigate Curwin, he had not met him before. He took his word that he owned the boat, and, if his story is to be believed, he paid $9500 cash on that basis, nor does his childlike credulity stop there. By his own act he retained Johnny McCluskey, and he says it was Johnny McClumskey, as his own and the boat's representative. He did not inquire as to the seamanship or the honesty of McCluskey. He does not tell us what satisfied him in these respects, he did not inquire. McCluskey, under the testimony, operated the boat until seizure, and even thereafter had the audacity to charge to the boat the price of an outboard motor at the shipyard of Garbutt & Walsh. Daniels rode in the boat but once.

In weighing the testimony of Daniels we are justified in considering his business experience. It is unreason-

able that a man with his background would entrust almost $10,000 to "the mysterious stranger" backed only by his word and his signature. Curwin's demand for cash was sufficient to put Daniels on notice that the boat was not "clean."

Daniels produced only one document, his bill of sale, and the Libelant he knew had a copy of that. He offered not a single corroborative circumstance; not a witness to a transaction nor a witness as to his character. Curwin and McCluskey were not produced. Daniels could not be considered in the light of his testimony an innocent purchaser of the Rethaluleu. He took pains not to make the inquiries a reasonable man would in spending a large sum of money. He asked for no certificate of title. He asked for no information at the Customs House. He inquired not as to the reputations nor fitness of property or personality. He shut his eyes saying to himself, "Well, if they question me later I can say 'I didn't know.'"

Title 46, United States Code, Section 325.

The statutes under which forfeiture is sought are statutes respecting the revenue. Title 46, United States Code, Section 325, has been so declared in *Maul v. United States,* 274 U. S. 501. At page 508 the Court stated:

> "One question is whether the vessel's liability to seizure was 'by virtue of any law respecting the revenue.' The liability arose from a violation of §§ 4337 and 4377 of the Revised Statutes—in that the vessel, being enrolled and licensed for the coastwise trade, proceeded on a foreign voyage without giving up her enrollment and license and without being duly registered, and was employed in a trade other than that for which she was licensed. The sections violated are found in a subdivision of the Revised Statutes en-

> titled 'Regulation of Vessels in Domestic Commerce,' but the arrangement of sections in the Revision is without special significance, Rev. Stats. §5600. That subdivision includes several provisions designed to regulate commerce by vessels and also to protect the revenue, these being related subjects. A reading of the sections violated in connection with others in the same subdivision makes it plain that they are directed to the protection of the revenue; and therefore they come within the terms of §3072. That they are also regulations of commerce by vessels does not make then any the less laws respecting the revenue."

Mr. Justice Brandeis in his concurring opinion on page 512, says:

> "Enforcement of the 'laws respecting the revenue' forms only a part of the ocean patrol duties imposed by Congress upon the Coast Guard. And seizure on the high seas of vessels which have 'become liable to seizure' does not exhaust the services required of the Coast Guard to ensure enforcement there of the laws respecting the revenue."

The Supreme Court having found that the statute under discussion is one respecting the revenue should it be given a narrow or a literal construction? This Honorable Court in *C. I. T. Corporation v. United States,* 44 F. (2d) 950, in speaking of a revenue statute, we feel, has answered this question. In this case an appeal was taken from an order of forfeiture and sale of a Graham Truck under the provisions of Section 3453 R. S. (26 U. S. C. A., Section 1185), appellant contending that the evidence was insufficient to justify the judgment for the reason that the truck in question was not within the premises or enclosure within the meaning of the statute imposing forfeiture. The only witness who testified as to the situation at the time of seizure testified that at the time the truck was

seized the rear wheels were just passing through the gate into the yard. In stating the above we have used the words of this Honorable Court found in the statement of fact. The decision goes on as follows:

> "* * * This rule of strict interpretation of statutes declaring forfeiture is not followed in construing the revenue laws of the United States. As was stated by the Supreme Court in U. S. v. Stowell, 133 U. S. 1, 12, 10 S. Ct. 244, 245, 33 L. Ed. 555:
>
> " 'By the now settled doctrine of this court (notwithstanding the opposing dictum of Mr. Justice McLean in United States v. Sugar, 7 Pet. 453, 462, 463 (8 L. Ed. 745),) statutes to prevent frauds upon the revenue are considered as enacted for the public good, and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature.' " (Citing cases.)

The Court in the Monte Christo, Federal Case No. 9,719 (17 Federal Cases, 607) had before it the act of December 31, 1792, from which Title 46, United States Code, Section 21, is derived. The charge was that the registration was falsely and fraudulently obtained. The Court stated:

> "In September, 1869, this American register, to the benefit of which the vessel was not entitled, was used by the vessel, with the knowledge of Currier, who took the oath of ownership and dispatched her on a voyage under it. The vessel thereupon became forfeited to the government, by virtue of the statute of December 31, 1792, §27, which declares, 'that if any certificate of registry or record, shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or

vessel shall be forfeited to the United States, with her tackle, apparel and furniture.' 1 Stat. 298.

"The forfeiture created by this statute, as well as by the act of July 18, 1866 (14 Stat. 184), under which the evidence also brings this case, is absolute; and in such case it is well settled that the forfeiture, is not defeated by a sale to a *bona fide* purchaser. It is therefore unnecessary to consider the evidence offered to show that the claimant Franklin was a *bona fide* purchaser of the vessel, or to determine whether either he or the master, who has contracted to buy her, are chargeable with knowledge of the fraudulent character of the register under which the vessel has been sailed. There must therefore be a decree condemning the vessel."

It was likewise held in the Dante (17 Fed. (2d) 304) that the want of knowledge of the owner was not a defense to a suit for forfeiture for a violation of this statute. The Court, at page 305, refers to the following:

Esther M. Rendle, 13 F. (2d) 839;

The Underwriter (C. C. A.), 13 F. (2d) 433;

The Resolution, Fed. Cas. No. 11,709;

The Mars (C. C. Mass.), Fed. Cas. No. 15,723;

United States v. One Black Horse (D. C.), 147 F. 770;

U. S. v. One Buick Automobile (D. C.), 300 F. 584;

Goldsmith Grant Company v. United States, 254 U. S. 505, 41 St. Ct. 189, 65 L. Ed. 376;

and remarks that these are persuasive that innocence or want of knowledge of the use to which the offending thing is put "is beside the question" and that by the terms of the statute The Dante became *ipso facto* forfeited upon engaging in illicit traffic.

A sale of the vessel which has violated this statute does not purge the vessel and avoid forfeiture. Honorable Judge J. C. Hutcheson, Jr., of the Southern District of Texas, had occasion to consider this point in the case of *United States v. Gas Screw "Sea Hawk,"* Admiralty No. 1383, decided November 10, 1930. Three grounds of forfeiture were alleged:

> First: That the vessel was altered in form and rigging and that no new license was thereafter procured;
>
> Second: That the vessel smuggled whiskey;
>
> Third: That the vessel was engaged in a trade other than that for which she was licensed.

The Court held that the proof did not support the first ground but that the other two were fully sustained. We quote from the opinion as follows:

> "The point was made that the vessel at the time of her seizure was not engaged in smuggling operations or in violation of the law and the Court could not in this proceedings forfeit her for past offenses. I think the decisions settle the law to the contrary.
>
> "In Wood v. United States, 16 Peters 342, the Court said:
>
> " 'It is of no consequence whatsoever what were the original grounds of the seizure, whether founded or not if the goods were in point of law subject to forfeiture.'
>
> "In the Underwriter, 13 Fed. (2d) 433, it was said:
>
> " 'The learned District Judge was in error in holding that the seizure must be lawful in its origin. The particular method used in bringing the vessel into the district of Connecticut was of no importance, in so far as the jurisdiction is concerned. As it appears that the *res* was in the possession of the col-

lector when the libel was filed, it is sufficient to support the jurisdiction of the libel.' Citing

United States v. Story, 294 Federal 519.

"While in Dodge v. United States, the Supreme Court said:

" 'The jurisdiction of the Court was secure in the fact that the Louise was in the possession of the Prohibition Director when the libel was filed.' 272 U. S. 532.

"While in the Gemma, 13 Fed. (2d) 149, and in Muriel E. Winters, 6 Fed. (2d) 468, forfeitures were entered of vessels in the custody of the Government for causes of forfeiture occurring before and wholly disconnected with the seizure. The jurisdiction of this Court then existing to enforce the title of the Government to the vessel if forfeitable and the facts existing to show that it had become forfeited, the United States should have its decree of condemnation and forfeiture, and it will be so ordered."

The Gemma, 13 Fed. (2d) 149 was affirmed in 16 Fed. (2d) 1016 in an opinion which characterized the objections to the lower court's decree as "without merit and entirely frivolous."

Goldsmith Grant Company v. United States, 254 U. S. 505, also supports Judge Hutcheson's ruling.

By citing cases where the courts have held that a *bona fide* purchaser's rights are forfeited under this statute we do not intend to have the Court believe that Daniels has established himself as such a purchaser. Our contention and the proof, we believe, is to the contrary.

The Circuit Court of Appeals for the First Circuit had occasion to pass upon this statute in *Alksne v. United States,* 39 F. (2d) 62. Certiorari denied, 50 S. Ct. 467.

The errors assigned are set forth in the opinion at page 68. The Court says:

> "The fact that the vessel was engaged in an unlawful trade being found by the court below, and upon evidence which established it beyond preadventure, she became liable to forfeiture under section 4377 of the Revised Statutes of the United States (46 U. S. C. A. §325) for engaging in a trade other than that for which she was licensed.
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> * * * * * * * *
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> "And coming down to recent times, since the enactment of the National Prohibition Act (27 U. S. C. A.), this court and the Circuit Courts in the other circuits have repeatedly held that the violation of that Act rendered a vessel liable to forfeiture under section 4377, Rev. St. (46 U. S. C. A. §325), as being engaged in a trade other than that for which she was licensed.
>
> "In The Esther M. Rendle (C. C. A.), 7 F. (2d) 545, 547, the court following the earlier cases said: 'Although the tug was licensed to engage in coastwise trade, its employment in illegal trade or traffic, whether coastwise or foreign, would subject it to forfeiture under Rev. St. §4377 (46 U. S. C. A. §325), as being employed in trade other "than that for which she is licensed."' When this case again came before the court on an amended libel (C. C. A.) 13 F. (2d) 839, the court followed the same rule and ordered the vessel forfeited."

The Court cited the following cases:

The Rosalie M. (C. C. A.), 12 Fed. (2d) 970;

The Underwriter (C. C. A.), 13 F. (2d) 433, 435, affirmed 274 U. S. 501, 47 S. Ct. 735, 71 L. Ed. 1171 (under title Maul v. United States);

The Mineola (C. C. A.), 16 Fed. (2d) 844;

The Dewdrop (C. C. A.), 30 F. (2d) 394:

which were all forfeited upon the same grounds and points out that in *The Underwriter* (*Maul v. United States,* 274 U. S. 501) that it was not suggested by either the counsel or the Court that the vessel was not liable to forfeiture under Section 4377 R. S.

The Court's reference to the Przemysl in the next paragraph is apt for Libelant's purposes (23 F. (2d) 336) although we base no point of law in this case upon that decision.

In reading this last mentioned case we find that this is the occasion upon which Libelant's witness Dresser boarded the Przemysl at New Orleans.

The Judge's decision shows that Anthony Strallo, alias Tony Cornero, was using the Przemysl to carry intoxicating liquor and Kruger, Libelant's witness, similarly testified in the instant case.

In *The Dewdrop, Le Bouef et al. v. United States,* (30 F. (2d) 394), (5th Circuit), in a libel filed under Title 46 United States Code, Section 325, against the vessel licensed for the coasting trade, the Court, under the facts stated in its decision, found for forfeiture, affirming the lower court.

In the *K-3696* (36 F. (2d) 430) the District Court of New York held that that vessel was forfeited for violating this statute.

In the *United States v. Dewey,* 188 U. S. 254, the Supreme Court stated that "cargo is the lading of a ship or vessel."

The Herreshoff, (6 Fed. (2d) 414 at 415), under a kindred statute (R. S. 4214) was forfeited.

"As to the remaining charge, it is contended for the boat that the evidence does not show that she was engaged in the transportation of merchandise for pay. It is true that there is no direct evidence that such was the fact. She had on board, however, more than 400 cases of liquor and wine, and she was only taken after a running fight lasting 20 or 25 miles. It was obviously a commercial undertaking in which she was engaged. There can be no doubt that her service was paid for."

In *The Rosemary*, District Court of New Jersey (23 F. (2d) 103), the motor boat was licensed as a pleasure yacht, was seized with 400 cases of whisky on board and was held subject to foreiture under this statute as engaged in a commercial activity without a license, notwithstanding the claim that the boat was not liable, because not employed in any "trade;" "trade" being defined as occupation, employment or activity. At page 105 the Court stated:

"It appears equally plain to me that the carriage of this large amount of liquor on the Rosemary constituted an activity altogether commercial in its nature, and thus violative of the provisions of section 4214, quite apart from the violation of section 4377, alleged in the libel. And since the commercial transportation of merchandise, be it lawful or contraband, is in the nature of trade, I am able to read in the circumstances of this case a direct violation of the intent of section 4377, and, without any violation to the term 'trade,' a violation of its actual wording as well.

"For, among its other meanings, 'trade' is defined as 'occupation, employment, or activity,' and therefore if the said section in its strict sense provides that "whenever any licensed vessel * * is employed in any other *activity* than that for which she is licensed * * * such vessel * * * shall be forfeited,' it appears to me that the Rosemary has

brought itself as a violator squarely within the scope of this section, and consequently is subject to forfeiture."

In the *Mineola,* (16 F. (2d) 844), the Circuit Court of Appeals for the First Circuit, in considering this statute had before it Claimant's contention that he had no knowledge of the illegal act of his lessee for which forfeiture was sought. The Court held that lack of knowledge upon his part was immaterial and that, although the reason for this holding was not stated, it was because the owner was bound by the acts of the master and crew and cited *Dobbins Distillery v. United States,* 96 U. S. 395.

On March 1, 1809, Congress passed the Non-Intercourse Act which declared that forfeiture followed its violation. This Act was before the Supreme Court in *United States v. 1960 Bags of Coffee,* (12 U. S. (8 Cranch.) 398). The Court stated at page 403:

"We are of the opinion that the question rests altogether on the wording of the Act of Congress by which it is expressly declared, that the forfeiture shall take place upon the commission of the offense. If the phraseology were such as, in the opinion of the majority of the Court, to admit of doubt, it would then be proper to resort to analogy, and the doctrine of forfeiture at common law, to assist the mind in coming to a conclusion. But from the view in which the subject appears to a majority of the Court, all assistance derivable from that quarter becomes unnecessary.

"It is true, that cases of hardship and even absurdity may be supposed to grow out of this decision, but on the other hand, if, by a sale, it is put in the power of an offender to purge a forfeiture, a state of things not less absured will certainly result from

it. When hardships shall arise, provision is made by law for affording relief, under authority much more competent to decide on such cases, than this Court ever can be. In the eternal struggle that exists between the avarice, enterprise and combinations of individuals, on the one hand, and the power charged with the administration of the laws, on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature. To them belongs the right to decide on what event a divesture of right shall take place, whether on the commission of the offense, the seizure, or the condemnation. In this instance, we are of the opinion, that the commission of the offense marks the point of time on which the statutory transfer of right takes place."

On the same subject the Supreme Court in *United States v. Stowell* (133 U. S. 1 at page 16), stated:

"The next question to be determined is from what time the forfeiture takes effect.

"By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith."

"The Pilot," 43 Fed. (2d) 491 (Circuit Court of Appeals of the 4th Circuit), contains many of the authorities recited in this brief and emphatically declares that the innocence of the owner of the vessel is not a defense to a forfeiture *in rem* under the Customs and Navigation

Laws and that the right to remit penalties for forfeitures incurred under these statutes rests solely in the executive department of the government.

Claimant's Offer of Proof.

Claimant contended that he was privileged to attempt impeachment of Libelant's deposition witnesses Kruger and Johnson by introducing in this cause the judgment roll and testimony in the cases of the *United States v. "The Seal,"* and *United States v. "A-1817,"* and the testimony of witness Leonard Wood and L. H. Williams and Homer H. Evans taken at those hearings. Objection was made before the Commissioner that Claimant's proffered evidence was on collateral matter and that the judgments and the testimony in those cases were immaterial to the issue at bar. The objection was sustained.

Claimant urged error in the Commissioner's ruling and argued his exceptions before Judge McCormick. Judge McCormick considered the exceptions and, as shown by Conclusions filed September 19, 1930 [Tr. 385], confirmed the Commissioner in his ruling in words as follows:

> "But it is not clear that the Commissioner erred in excluding the proffered evidence. The Commissioner ruled that the proffered matter was collateral to the issue before him and that at best the matter was offered as impeachment of the witnesses Kruger and Johnson, and being impeachment upon collateral matters, it was irrelevant and immaterial to the issue as to the 'Rethaluleu.' There is considerable strength in this position."

This Court in reading the transcript will note that the depositions of Kruger and Johnson were taken upon Stip-

ulation of the parties. Claimant was represented and cross-examined at length. Personal appearance of these witnesses at the trial being thus waived, Claimant was foreclosed from attempting impeachment even upon a material point. It is elementary that before a witness can be impeached, if the impeaching matter is reduced to writing, it must be first shown to the witness and he be allowed to explain or reconcile any inconsistencies.

In *Crocker First Federal Trust Company et al v. United States* (9 C. C. A.), (38 F. (2d) 545), Your Honors had occasion to consider whether or not a witness could be impeached by allowing Defendant's counsel to pursue the avenue of investigation desired. The witness had testified that he purchased liquor at certain premises and that he was alone when he entered the hotel and when he purchased the liquor. He was asked to write upon a piece of paper in order to identify the handwriting in the hotel register. The Court directed counsel to let the witness pick his signature from the book. Objection was made that this was not proper cross-examination and the Court then refused to allow counsel for the Defendant to follow this line of examination. Defendant objected, pointing out that the handwriting would show that the witness had testified falsely. This Court stated at page 547:

> "In view of the evidence, it was certainly proper for the court to require that the witness be shown the hotel register and the disputed signature, or at least an opportunity to identify his handwriting thereon before embarking in an investigation of handwriting. It is required that a witness be shown documents containing statements alleged to conflict with his testimony before he is interrogated thereon

(sections 2052, 2054, California Code of Civil Procedure; People v. Lambert, 120 Cal. 170, 52 P. 307; 40 Cyc. 2732, III), and the hotel register was alleged to be such a document. Moreover the offer was to impeach the witness and a witness cannot be impeached upon an immaterial or collateral matter, particularly when it is first brought on cross-examination. 40 Cyc. 2769. * * * There was no claim here of that broad right of cross-examination but the narrower right of impeachment. * * * The ruling of the trial court was not an abuse of discretion."

Rule to Be Applied.

The Supreme Court of the United States adopted the rule in *Davis v. Schwartz* (155 U. S. 631), that in a case referred to a Master to report the evidence, the facts and his conclusions of law, there is a presumption of correctness as to his findings of fact similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the Court under Rev. Stat. §469, or in an admiralty cause appealed to this Court.

The Circuit Court of Appeals in the *North Star*, 151 Federal (168) at page 177, held that the findings of a Commissioner in admiralty on questions of fact depending upon conflicting testimony or the credibility of witnesses should not be disturbed by a court of revision unless clearly erroneous.

The functions of a Commissioner, to whom a matter in admiralty has been referred, * * * are analogous to those of a Master in Chancery.

In *Kimberly v. Arms,* 129 U. S. 512, a reference by consent is distinguished from a reference under the

usual order of the Court. At page 524 Mr. Justice Field stated:

> "A reference by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

In the *Chiquita,* 44 F. (2d) 302, at page 303 (9 C. C. A)., this Court stated:

> "In cases such as this the rule is well settled that the findings of a special master, approved by the trial court, will not be set aside or reversed on appeal except for manifest error in the consideration given to the evidence, or in the application of the law."

The testimony taken before the Commissioner fully supported the finding that the Rethaluleu was knowingly and fraudulently licensed. The Commissioner had before him the fact that Tony Cornero, owner of the cargo of the Przemysl, had supervised the loading of the liquor cargo at Hamburg, Germany, in August 1927. The testimony next placed the Przemysl at New Orleans. According to the facts statement of Judge Burns (23 F.

(2d) 336 at page 339) the Przemysl was in the vicinity of New Orleans, Louisiana, on October 28, 1927. Witness Dresser was aboard the Przemysl there. [Tr. 94.] It passed through the Panama Canal in June of 1928 into the Pacific Ocean. Arriving at a position off the Coast of Southern California it was contacted by the Rethaluleu in July, August and September of 1928. [Tr. 281, 282, 287, 289, 290, 292, 316, 347, 348 and 361.] Kruger's and Johnson's testimony show that Cornero contacted the Przemysl on the Rethaluleu and he was in contact with the Przemysl and its cargo many times. He was on the Przemysl on September 30, 1928, and fled on the Rethaluleu when the Coast Guard vessel appeared.

The contract for the building of the Rethaluleu was signed May 16, 1928, and she was licensed in the Customs House July 30, 1928.

Strallo, alias Cornero, did not come from Europe on the Przemysl. He had shipped his cargo and it was necessary that he complete arrangements in the United States for the bringing of his cargo to shore. For this purpose he needed speed boats faster than the vessels of the United States Coast Guard. The evidence shows that he secured a vessel suitable for this purpose.

The United States Commissioner viewed the boat, observed her accommodations, her cargo carrying space, her fuel storage tanks, and taking these into consideration must have concluded that she was built for rum running.

There is not a line of evidence or a suggestion that this boat was ever used for pleasure in the lawful use of that term. If rum running is pleasure there is support

in the evidence that the boat was used according to its license, but this igenuous argument has not been advanced by Claimant.

The fact that in every case where a payment of money was to be made it was made in cash, that no record was left as to who paid it or where the payee lived; Johnny McCluskey and "the mysterious stranger," J. H. Curwin were not produced at any time in this proceeding; the men who built the Rethaluleu are vague in all their references to Strallo alias Cornero; the Rethaluleu was early put upon the Coast Guard's suspected list and a strict surveillance, so far as possible, was kept of her whereabouts from the time she entered the water; Claimant Daniels's halting explanation "That all I wanted was a clean bill of sale," further illuminates this picture.

Curwin is recorded present on only three occasions:

First: The contract for the boat;

Second: The licensing thereafter in the Customs House;

Third: Immediately after the Przemysl was seized and those who were responsible for her activities knew that all boats which had assisted her were subject to seizure, went through a paper transaction with Daniels seeking to absolve the boat from the consequences of her activity.

It is significant that this "good faith" Claimant, Daniels, did not produce a record of his bank account to show that he ever had withdrawn at one time, and particularly on December 5, 1928, $9500 of his funds.

So we say that there is abundant evidence in the record which justified the Commissioner's finding that the

vessel was fraudulently licensed; was conceived for a fraudulent purpose; paid for under circumstances which made it difficult for those who clothed with the power and authority might inquire into its history, and to identify persons, and circumstances, and find the purpose for which she was built.

Examination of incidents and facts preceding a crime is a powerful aid in establishing whether or not a well conceived plan was formulated and executed or whether the act was spontaneous and without preparation. If the Commissioner had held otherwise, we submit, he would have failed to have accredited to the evidence the weight and authority which it carried.

We find in the recent opinion of the District Court of Massachusetts, Civil Number 4379, opinion dated March 23, 1931, in *United States of America v. American Gas Screw "Marge,"* the following expression applicable to this situation:

> "The structure, equipment and history of the boat was such that it taxes one's credulity to believe that it was being used for purposes purely innocent; on the contrary, it is impossible to escape the conviction that the vessel was a rum-runner, masquerading on the high seas as a pleasure vessel,"

and while the following from the opinion concerns the seizure in that case, we complete the quotation of the opinion because it concerns the burden of proof,

> "and when such a vessel is discovered with a quantity of liquor on board, which corresponds in all particulars with that landed on shore in the night time, and this from a boat which, in outline and dimensions, is similar to the 'Marge,' it is enough to throw the burden upon the claimant to show that it was

not the 'Marge' that was engaged in this unlawful enterprise. This burden the claimant has not sustained."

At another point in the same decision the Court states:

"It has been held in this jurisdiction that yacht enrolled as a pleasure vessel, engaged in the transportation of large quantities of liquor, must be presumed to have been engaged in the transportation of merchandise for pay, even though there is no direct evidence that such was the fact. *The Hereshoff,* 6 F. (2d) 414; *Bush v. The Conejo,* 10 F. (2d) 256; see, also, *The Rosemary,* 23 F. (2d) 103."

CONCLUSION.

The Commissioner had an opportunity to observe the witnesses, the right of cross-examination was given and exercised on every occasion by Claimant. Probable cause was found and the duty was placed upon Claimant thereafter to obsolve his vessel, and both lower courts having found that the Claimant failed in this regard, Libelant and Appellee prays that this Court affirm the decree and judgment of condemnation which this vessel so richly deserves.

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